No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., *et al.*,

Appellees.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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I.
Statement of the Pleadings.

The pleadings can be best understood by reference to a chart thereof, Appendix page 1. The jurisdictional basis for various pleadings appears hereafter under II of this brief entitled, "Jurisdiction of the District Court and United States Court of Appeals." This portion of the brief is devoted to outline of the pleadings as such.

1. The Complaint of Westinghouse Electric Supply Company.

The action was commenced by the filing of a complaint [R. 3] by Westinghouse Electric Supply Company (hereinafter referred to as Westinghouse), in which the

United States of America appears as a nominal plaintiff as authorized by 40 U. S. C. A. 270b, known as the Miller Act. The complaint alleged that Westinghouse supplied materials to E. B. Woolley, who was a subcontractor for Wm. Radkovich Company, Inc., a prime contractor (hereinafter referred to as Radkovich), employed by the United States of America as owner to construct one hundred houses known as Temporary Family Quarters at Muroc Army Air Field, Muroc, California, and that all of the materials so supplied were used in the construction of said houses.

The defendants named in said action were E. B. Woolley (hereinafter referred to as Woolley), the subcontractor, Radkovich, the prime contractor, and certain sureties for Radkovich, whose names appear on the aforesaid Chart of Pleadings and who will hereinafter be referred to as Radkovich Sureties. All of these defendants answered. Woolley [R. 32] and Radkovich [R. 29] each filed separate answers and Radkovich Sureties [R. 26] collectively filed an answer.

2. The Cross-claim of Radkovich and Radkovich Sureties.

Radkovich and Radkovich Sureties filed a cross-claim [R. 18]. The cross-claim is not based upon federal statute. The cross-claim asserted that if cross-claimants were liable to Westinghouse for the materials supplied to Woolley upon his order and used by him in the performance of his subcontract, then Woolley was liable in like amount to cross-claimants less any amount due from Radkovich to Woolley in payment of amounts earned by Woolley by performance of his subcontract.

The cross-claim also alleged that Glens Falls Indemnity Company (hereinafter referred to as Glens Falls), ex-

ecuted a payment bond thereby binding itself as surety for Woolley unto Radkovich. The original cross-claim was amended to add that Glens Falls also executed a performance bond binding itself as surety for Woolley unto Radkovich. The amendment appears at page 87 of the record, but it is not necessary to refer to the amendment because it was accomplished by substitution of original pages pursuant to authorization and order of the court. Consequently, the cross-claim as printed in the record is complete as amended. The language of the cross-claim as originally presented unamended does not appear in the record.

Cross-defendants Woolley [R. 55] and Glens Falls answered. The answer of Glens Falls [R. 36] was amended [R. 89] at the same time the cross-claim was amended and the amendment to the answer was accomplished by substitution of pages pursuant to authorization and order of court. Consequently, the answer as printed in the record is complete as amended and the language of this answer as originally presented unamended does not appear in the record. However, there is a misprint in the record at page 37, paragraph III, making it necessary to refer to the portion of paragraph III appearing at page 90 of the record for the complete sense of this paragraph of the answer. Woolley admitted the amended paragraphs of the cross-claim by failure to answer them and he did not amend his answer after amendment of the cross-claim.

3. The Cross-claim of E. B. Woolley.

Woolley filed a cross-claim [R. 59] in which the United States of America appears as a nominal cross-claimant as authorized by the Miller Act (40 U. S. C. A. 270b). The cross-claim alleged that Woolley had furnished to Radkovich labor, equipment, supplies and materials and

that all of the same were furnished to be used and were actually used in the government work above referred to and that they had not all been paid for and that, therefore, Radkovich and its sureties were liable for the unpaid balance, and they were named as cross-defendants.

This cross-claim was amended [R. 82]. The answers of Radkovich [R. 71] and of Radkovich Sureties [R. 76] had been filed before the amendment but were couched in language sufficient to answer satisfactorily the supplement and amendment to cross-claim and were not subsequently amended.

4. Summary of Pleadings and Judgment.

The pleadings present what are in effect three separate but interlocking lawsuits. For convenience of distinction they will be hereinafter referred to respectively as the Westinghouse action, the Radkovich cross-claim and the Woolley cross-claim. Judgment in favor of Westinghouse was rendered against Radkovich and Radkovich Sureties [R. 204]. Judgment was granted in favor of Radkovich and Radkovich Sureties against Woolley and Glens Falls in an amount equal to the judgment in favor of Westinghouse [R. 204]. Woolley recovered upon his cross-claim against both Radkovich [R. 211] and Radkovich Sureties [R. 205] for the amount of labor and materials which went into the work and separately against Radkovich as a matter of incidental relief for loss occasioned by delay of Radkovich [R. 205].

The judgment expressly provided that the amount of the judgment against Glens Falls and Woolley should be reduced by the amount of the judgments in favor of Woolley [R. 205]. This leaves a balance payable by Woolley and Glens Falls.

II.

Jurisdiction of the District Court and the United States Court of Appeals.

1. Jurisdiction of the District Court.

a. As to the Westinghouse Action.

Westinghouse based jurisdiction relating to its main claim upon the specific provisions of federal statute, 40 U. S. C. A. 270b, which provides in part:

> "That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed."

The statute further provides that every suit instituted under this section shall be brought in the name of the United States for the use of the person suing in the United States District Court for any district in which the contract was to be performed. The complaint contained appropriate allegations to bring the action within these provisions of the law [R. 3, par. I].

Defendants Radkovich and Radkovich Sureties are alleged to be principals on the payment bond referred to in the statute which is required by 40 U. S. C. A. 270a [R. 7, par. IV]. The contract is alleged to have been

performed at Muroc, California, which is within the district of the trial court [R. 5, par. III].

Another phase of the Westinghouse action is a suit for the unpaid balance due to Westinghouse from Woolley on the purchase of electrical equipment which apparently relies for jurisdiction upon diversity of citizenship between Westinghouse, a Delaware corporation, and defendant Woolley. Neither the citizenship nor residence of Woolley is alleged in the complaint, nor does it appear elsewhere in the record.

b. As to the Radkovich Cross-claim.

Jurisdiction of the Radkovich cross-claim is apparently based upon Federal Rules of Civil Procedure, Rule 13(g) and (h) and Rule 14, and upon the cross-claim being ancillary to the Westinghouse action. Appellant Glens Falls contends that the Radkovich cross-claim is not ancillary to the Westinghouse action and that since no independent basis of jurisdiction exists, the District Court lacked jurisdiction to entertain this cross-claim and to enter judgment thereon. See *United States v. Biggs* (D. C. E. D. Ill., 1942), 46 Fed. Supp. 8, 11; *Seaboard Surety v. United States* (C. C. A. 9, 1936), 84 F. 2d 348, and discussion Point VII-1 of this brief.

c. As to the Woolley Cross-claim.

The Woolley cross-claim is primarily based upon federal statute, the Miller Act (40 U. S. C. A. 270b), and the jurisdiction therein granted to the United States District Court. The cross-claim is brought in the name of the United States of America pursuant to authority referred to above relative to the Westinghouse action. The cross-claim alleges facts showing that the foundation for the action is a government contract within the district of the

trial court [R. 62] and subject to the provisions of 40 U. S. C. A. 270a, requiring a payment bond [R. 62] and that the same was provided by named sureties [R. 63] which sureties are Radkovich and Radkovich Sureties, the parties defendant. It states that certain sums are due and unpaid [R. 65-66]. A second cause of action is a restatement of the first in the form of a common count [R. 67]. A third cause of action seeks damage for delay caused by Radkovich.

2. Jurisdiction of the United States Court of Appeals.

Jurisdiction on appeal is based upon 28 U. S. C. A. 1291.

III.
Facts.

A contract [herein referred to as the prime contract, Ex. B], was entered into between the United States of America and Wm. Radkovich Company, Inc., a California corporation, for the construction of 100 poured concrete houses to be used for temporary family quarters for the Army Air Feld at Muroc, California. The contract was dated June 19, 1947. The houses were an experimental type concerning which the government had no prior experience [R. 308].

In July of 1947, Wm. Radkovich, the individual who was President of the corporate party to these proceedings, and E. B. Woolley (an Individual hereinafter referred to as Woolley), met each other for the first time while Woolley was doing electrical wiring at the home of Radkovich [R. 393]. As a result of this meeting, Woolley was persuaded to bid upon the electrical work which Wm. Radkovich Company, Inc. (the corporation, here-

inafter referred to as Radkovich), was required to do pursuant to the prime contract. Radkovich supplied Woolley with a set of specifications [part of Ex. B], and a drawing [Woolley's Ex. 5], showing the wiring required for each house [R. 394]. Based upon these documents, Woolley made his bid which was accepted and a subcontract was entered into dated July 30, 1947 [copy appears at R. 42; Ex. C].

The houses were to be constructed in the following way: An interior wall form would be set up. Woolley as the electrical contractor would then fasten steel tubing, outlet boxes and the like to the outside of this form [R. 266, 423]. Then another form would be set up in such a manner as to leave a space between the interior and exterior form. The electrical conduit, outlet boxes and any other electrical equipment which Woolley had fastened to the original form would be between the two forms. The space between the two would then be filled with cement [R. 274]. As soon as the cement hardened, the forms would be removed. This would leave a solid concrete wall with all of the electrical conduits and outlets in place. The tubing cast in the concrete might be likened to wormholes running through the wall just where they were needed.

Every one of the 100 houses was like each other one so that once the shape of the conduit or steel tubing could be determined, the conduit for all of the houses could be prefabricated and the electrical wire to go through the tubes could be cut to length [R. 265-266]. But no prefabricating of this character could be done until the design was settled because any change in the routing of the conduit would result in the waste of any steel tubing

bent or cut to conform to another design and a similar waste of any wire already cut with a consequent increase in cost [R. 396].

With this type of construction and a program for the construction of 100 identical houses, it hardly need be observed that much of the electrical subcontractor's work could be done before any house was poured and that considerable of the electrical subcontractor's work must necessarily be done before even the first house was poured.

Before the date of Woolley's subcontract, Radkovich received notice to proceed by letter dated July 22, 1947 [R. 206], and had commenced work July 28, 1947 [R. 300]. Radkovich started unloading equipment on July 31, 1947 [R. 306]. By letter dated August 8, 1947 [Woolley's Ex. 1], Woolley was given notice to proceed, to check with the General Superintendent, Mr. Ted Thompson, and to check all drawings for errors and discrepancies and report any errors to J. D. Barrington. After Woolley received this notice to proceed, he reported to the General Superintendent at the job site [R. 395], who told him that the work would commence right away and instructed Woolley to ship his materials and be ready to go about August 15, 1947 [R. 395]. Shortly after receiving the letter referred to above [R. 444], Woolley also went to see Barrington [R. 397].[1] There were two

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[1]About the same time by change order dated August 18, 1947, to the prime contract [see Ex. B] 100 electric heaters were deleted from the materials to be supplied by the contractor and consequently from the electric supplies to be supplied by Woolley, the subcontractor. There was a dispute between Woolley and Radkovich as to the amount of reduction which should be made in the subcontract price by reason of this modification. This issue was settled by the trial court and is not the subject of this appeal. This modification was fully authorized by the terms of the subcontract and is not disputed by appellant.

persons named Barrington who were employees of Radkovich. The record is uncertain as to the identity of the Barrington who figures in the testimony, but whichever one is referred to had charge of shop drawings [R. 372].

Woolley went to Barrington's office with his drawing to adjust some location changes [R. 397]. These were service objections (practical details) which the man in Barrington's office said he could not change without the okay of Keller, the chief electrical inspector. With Keller's okay, the man in Barrington's office got up a drawing [Woolley' Ex. 6], and Woolley approved it [R. 398]. Woolley could not commence wiring pursuant to this drawing because it had to go to the army engineers for approval. It was sent to the Radkovich office for processing through the office of the United States Engineers [R. 398].

Exhibit 6, was not approved and is marked unapproved. A substitute was then prepared and dated August 27, 1947. This substitute was entitled "Revised Electrical Plan, Muroc Army Air Field, Muroc, Cal. Temporary Family Quarters." Blueprints were made from this tissue tracing. One of them is Exhibit I [R. 364]. Then the tissue tracing was given to Woolley on or about August 27, 1947 [R. 253]. At about the same time, August 28, 1947, Woolley's crew came on the job and started prefabricating pipe [R. 261, 396]. There are various drawings of the electrical plan in evidence. There is some inconsistency which appears from the testimony of the various witnesses as to just which of the exhibits was on hand at the time of certain conversations and there is comment upon the difference between one of the exhibits and another; however, there is complete agreement as to essential substance.

There are two drawings actually in issue. One of such drawings is represented by Exhibit 5, J, and sheet No. 6 of Exhibit H, which is the drawing upon which Woolley's bid was based. These are all identical in the drawing detail shown. This will hereinafter be referred to as the Original Electrical Drawing. The other is the Revised Electrical Plan above referred to which is represented by Exhibits I, K and 11. Except for penciled notes of approval or a stamp of approval, the Exhibits I, K and 11 are all identical, In other words, they are identical in the drawing detail shown and there is no dispute but that they originated August 27, 1947. Hereafter this drawing will be referred to as the Revised Electrical Plan.

When Woolley received the Revised Electrical Plan he noticed that additional detail had been added [R. 253], which required additional work and materials the necessity for which was not reflected on the Original Electrical Drawing [R. 400]. The additions turned out to be an additional cost to Woolley of $8,277.67 [Finding XV, R. 198]. The total subcontract price, not including the items making up the $8,277.67, was $74,500.00 after equitable adjustment for deletion of electric heaters by change order referred to in footnote 1 above [Finding XIII, R. 197].

Woolley and Higuera, Woolley's employee, immediately [R. 400], went to see Mr. Parks, a Radkovich employee who had charge of coordinating the work with the government and subcontractors [R. 272-273]. According to Woolley, Mr. Wm. Radkovich was also present [R. 400]. This is not inconsistent with Parks' statement concerning the conversation because Parks was not asked to testify

as to who was present. According to Parks, this conversation took place on August 27 or 28, 1947 [R. 355].

Woolley pointed out the differences between the Original Electrical Drawing and the Revised Electrical Plan. He specifically pointed out that the Revised Electrical Plan showed items that did not appear in the previous drawing, including telephone circuits, signalling system (also referred to as bell circuits and chime circuits), closet lights and fixtures [R. 356, 374, 401]. Woolley testified that he told Mr. Radkovich that he had never figured on these changes and asked what Mr. Radkovich was going to do about it. Mr. Radkovich replied that he did not know and asked Mr. Parks the same question. Mr. Parks stated that he did not know; that the former plan had been approved and he did not know why the contractor would have to "put this other stuff in" [R. 401]. Parks telephoned the office of the army engineers and made an appointment for the next morning. Mr. Parks and Woolley went to the office of the army engineers the next morning to see Mr. McCumber who was responsible for drawings and channeling them through the office of the United States Engineers to obtain approval [R. 356, 401].

The Revised Electrical Plan and the additional features shown thereon were discussed with Mr. McCumber. Woolley asked who would pay for the added items. McCumber told him that they were in the prime contract and that Woolley and Radkovich would have to get together on the problem of payment and that this was not within the jurisdiction of the engineers and that Woolley had no standing in their office. The engineers only recognized the prime contractor [R. 357, 401-402].

Woolley and Parks left McCumber's office and Woolley returned to see Mr. Radkovich either the same day or later in the same week [R. 402]. Mr. Radkovich testified about this meeting with Woolley. He said that he told Woolley that he would see that Woolley was paid for the bell system. He said he was confused as to whether it was the bell system or the telephone system that they were discussing and conceded that it could have been both. He said that there was also discussion about closet lights and he acknowledged that he might have said that he would see that Woolley was paid for this item [R. 271-272]. It is worthy of note that this testimony includes three out of four of the items which were added on the Revised Electrical Plan. No question was put to the witness as to the fixtures, the fourth item.

We quote the testimony of Woolley concerning this same meeting [R. 402]:

> "Q. Did you have a further discussion then after that with Radkovich as to what was to be done about these so-called extras? A. Well, in (*sic*) the same day but later in the week, why, we had to get going on it, so I went over to see him. And he said the army was going to take the job away from him if he didn't get started here. It had already been delayed for quite a while; for me to go ahead and wire to this plan and he would take care of the extras, he would pay me for them.
>
> The Court: Who said that?
>
> The Witness: Wm. Radkovich.
>
> Q. (By Mr. Benedict): Did you thereupon proceed with the performance of your subcontract? A. I did."

The words "in" and "not" have the same shorthand character. It is therefore reasonable to assume that Woolley testified, "Well, not the same day, but later in the week, . . ." He saw Radkovich not the same day that he saw McCumber, but later in the week. Assuming the testimony of Parks to be correct, that Woolley and Higuera came in to see him on the 27th or 28th, the week would have ended on Saturday, the 30th. The next Monday, September 1, 1947, was Labor Day, and it may be that Woolley's meeting with Mr. Radkovich which was the subject of the above testimony was not during the Labor Day weekend, but afterward during the week starting Sunday, August 31, and ending Saturday, September 6. The Revised Electrical Plan had apparently not been officially approved by the engineers as of the date of the above conversation for the stamp of approval by the United States Army Engineers is dated 26 September 1947. As noted below, Woolley's testimony taken as a whole was to the same effect [R. 396].

Notwithstanding the conversation with Mr. Radkovich, which no doubt satisfied Woolley as far as it went, it was not economically safe for Woolley to do any prefabricating work until the drawings had received official approval of the United States Engineers, so consequently at this point he ordered his crew to stop prefabricating [R. 374, 396]. Note Woolley's testimony that he stopped the crew because "we didn't know, until the Army approved, what the changes were going to be, whether they were going to approve the changes or not." [R. 396.] This indicates that the tissue drawing of the Revised Electrical Plan given to him before the conferences related above was not already approved by the engineers.

Therefore, it must have been Exhibit K and not Exhibit 11, which he had at the time of the conferences. And the conferences must have taken place in August as Parks said. This is consistent with Woolley's testimony that the crew had been on the job about a week (they started August 28, 1947), doing the prefabricating work and had accomplished only about $200.00 worth of constructive work. Even a shorter period on the job of prefabricating could, we think, account for $200.00 worth of constructive work, so that if they went to work on August 28, and were ordered to stop on September 30, the result is not contrary to what might be reasonably expected.

As already observed, shop drawings as worked out in Barrington's office had to be processed through Radkovich's office to the engineers for final approval [R. 398]. Woolley testified that he "wired to this plan" [R. 402-403], but that he commenced operations October 4, 1947 [R. 396]. We assume that the blueprints taken from Exhibit K, prior to delivering it to Woolley were processed through the office of the United States Engineers obtaining official approval on September 26, 1947, and that around September 30, 1947, [R. 399], an approved drawing [Ex. 11], was delivered to Woolley. He then commenced work with assurance that the plan was officially approved. This would allow sufficient time to do what was necessary on this part before the first house was poured (on either October 2, or 4, 1947).

We have detailed this evidence in an effort to arrive at some logical and consistent sequence of events, but we acknowledge that Woolley's testimony as to the *date* of his conversations with Mr. Radkovich, Parks and Mc-

Cumber is not in accord with this statement [R. 399]. Neither is Woolley's testimony as to this date in accord with the rest of his own testimony or the testimony of other witnesses. We believe that Woolley's testimony as to the *date* of the conversations is based upon his mistake in identifying Exhibit 11, as the tissue tracing he had in hand during the conversations instead of Exhibit K.

Woolley based his identitfication upon the fact that it bore the approval stamp of the District Engineer. This is the very thing which should have indicated that Exhibit 11, was not the one for, as noted above, Woolley stopped his crew right away because he didn't know whether the engineers would approve the changes indicated or not [R. 396] and his crew which started work August 28, 1947, did less than a week's work before they were stopped [R. 397]. None of these things are consistent with the idea that Woolley received the Revised Electrical Plan for the first time about September 30, 1947, as he testified at page 399 of the record.

On the other hand, both Exhibit K and Exhibit 11 had approvals on them. Exhibit 11 had the stamp of the District Engineer. Exhibit K had the penciled notation of approval by Keller, the chief electrical inspector on the job. It seems most reasonable to assume that this fact caused Woolley to make a mistake in identity. This is in direct conformity with Park's testimony [R. 354, 364] and Woolley's other testimony noted above. Mr. Parks positively identified Exhibit K as the one Woolley had with him.

There is one difficulty or inconsistency remaining. The penciled approval by Keller on Exhibit K bore a date which was read in evidence as 9/26/47 [R. 364]. But

Mr. Parks was of the opinion that the date was actually 8/26/47. No one took issue with that opinion. We assume that it is right. There still seems to be a one-day discrepancy since the Revised Electrical Plan itself is dated August 27, 1947. It is an easy thing to make an error in writing a date. Moreover, there is no testimony that it is Keller's handwriting. It may even be that this notation was made by someone else than Keller to record the fact that Keller's approval to the changes indicated was given on that date. To give maximum support to the findings, the general conflict in the evidence must be resolved this way.

The court did not attempt a chronological statement in the Memorandum of Conclusions, but treated the issues according to subject matter. For this reason the conflict was not recognized. Note the court's statement [R. 100]:

> "The evidence is clear that Woolley received notice to proceed prior to August 28, 1947, and that the contractor had not 'poured' any houses in which Woolley could place electrical wiring until October 4, 1947."

The date of October 4, 1947, a Saturday, apparently comes from Woolley's uncertain testimony on page 396 of the record as to when he commenced operations. This conflicts with the allegation in Woolley's cross-claim that it was Monday, October 6, 1947, that he commenced operations [R. 69, 96]. The more reliable statement seems to be from Mr. Fergason, the resident engineer, who positively stated that the first house was poured on a Thursday, October 2, 1947 [R. 267].

The quotation shows that the court was under the impression that no part of the electrical work could be

done until a house had been poured. The same error appears in [Finding XVI, R. 199]. As a consequence of this misunderstanding, the court apparently accepted Woolley's version as to the date he commenced operations and as to the date of his conference with Mr. Radkovich which results in such a conflict in Woolley's testimony as to leave his claim for damages for delay entirely without support because there would be no reason for an idle crew which could have prefabricated during the entire month of September, 1947, were it not for the unapproved changes in the drawings. Woolley testified that his men went to work August 28, 1947, and that he ordered them to stop after only a week of prefabricating because of the Revised Electrical Plan which he had just received [R. 397].

If he did not receive the Revised Electrical Plan until September 30, 1947, then they must have worked a month and any stop order given September 30, 1947, or thereafter was only for a day or so because he recommenced, according to his own statement, by October 4, 1947, contrary to his testimony that they only prefabricated for a week. Moreover, giving credence to the shortest time element which his testimony will support in seeing Mr. Radkovich, and Parks and, the next day McCumber, and, the next day, Mr. Radkovich, the September date is wrong because the first house would have been poured at a time when Woolley's men were off the job or on the very day of Woolley's talk with Mr. Radkovich. This of course is impossible since, according to all the testimony, the first house, like every other house, was wired according to the Revised Electrical Plan. Woolley's electrical work is in the cement casting,

having been placed there prior to the time the house was actually poured.

In order to make a statement of facts which is understandable, it is necessary for appellant to try to put into sequence such of the evidence as is important to the questions raised and to an understanding of the case. This has the effect of pointing up the conflicts and necessitates the foregoing and the following attempts to reconcile the testimony.

The really important misstatement or misconception of the evidence by the trial court is evidenced by this statement made by the court [R. 135]:

> "We are satisfied that if Woolley ever understood that Radkovich had agreed to compensate him in addition to the sum of his subcontract, *such understanding was of short duration,* and was dispelled by correspondence before the fixtures, etc., were installed by Woolley." (Emphasis added.)

This is a serious error. As a matter of fact, Woolley's testimony immediately following that portion of his testimony quoted above is as follows [R. 403]:

> "Q. After you had started on the performance of your subcontract did you have any further conversations with Radkovich relative to your furnishing electrical fixtures? A. *Not until quite late in the contract.* They sent me a letter asking for a brochure on the fixtures and I called Parks back and told him that I was not supposed to furnish the fixtures. And he said I had better come over and get together with Bill and him, and I did that, and that was quite an argument we had that day and wound up with Radkovich saying: 'It is in the specification.

> You are stuck with it and you are going to furnish them.' Of course, I walked out pretty hot, and I guess everybody was pretty hot that day. However, I went back again. Well, it turned out the same way, though. I mean we couldn't agree on the fixtures, and so he felt that I was supposed to supply them, and I felt that I was not; so it was just left at that until these letters came into effect." (Emphasis added.)

The proximity of this testimony to the testimony of the earlier conference in the record may have led the court to believe that in point of time one soon followed the other.

The actual time of the latter is not identified except by reference to a letter asking for a brochure. It should also be noted that the question and the answer last above quoted relate exclusively to fixtures. It seems most likely that this relates to the request to which Woolley's attorney responded by letter dated May 25, 1948, which is a part of Exhibit 10. The above quoted testimony therefore probably relates to a discussion between Woolley and Mr. Radkovich in May of 1948. It is an indisputable fact that most of the contract had been completed between the first conversation, whether in August or September, 1947, and the second. The first conversation was before the first house was poured. The second was at a time of 87% contract completion. The 7th progress payment based upon 87% completion was made in May of 1948. *The time element between the two conversations was seven or eight months.*

In the course of the trial there was considerable testimony as to just what had been added by the Revised Electrical Plan [R. 271-272, 263-265, 311-341, 357, 367,

375-376, 400, 412-418, 434-451, 462-463, 467-477]. The detail of this testimony is unnecessary to this appeal except to note that the telephone circuits, the bell circuits, the closet lights were all included. As the work progressed each house contained all of the items. In order to install them, it was necessary for Woolley to redesign the conduit he was fabricating and to add such additional material as the items called for [R. 396, 400-403, 457]. The additional material as well as the additional expense went into the job daily, resulting in a change in the performance of the subcontract from the beginning.

Materials for the job as specified in the Revised Electrical Plan had to be purchased and kept on hand as the work proceeded. Payment was authorized and made, taking into consideration all of the materials on hand and all of the work done by Woolley at the time the estimate was prepared [Ex. B, Art. 16, R. 261 and Ex. A, Art. 3, R. 44-45 and 458]. There is no testimony or evidence of any intent to segregate the cost of materials or labor between what was called for by the Original Electrical Drawings and those added by the Revised Electrical Plan which additions have been misleadingly referred to as extras.

As some of the houses neared completion, the Government began to write to Radkovich about the fixtures [Ex. F]. As is evidenced by the correspondence which is in evidence as Exhibit F, Radkovich passed the Government's inquiries and demands on to Woolley. Early in May, 1948, the issue of who would furnish and install fixtures and for what compensation was precipitated [R. 403]. At this time Woolley and Radkovich had the conference in which Woolley testified everybody "got pretty

hot" [R. 403]. After that Radkovich took the position that Woolley was responsible for the fixtures and also all of the other items formerly discussed and that Woolley was entitled to no increase of his subcontract price. Radkovich contended that they were all a part of the subcontract and maintained this position throughout the trial [R. 403, 130].

Woolley took the position that he was entitled to be compensated for all of these items over and above the subcontract price [R. 402]. He never retreated from this position [R. 476]. On June 1, 1948, a conference was held between Mr. Woolley, Mr. Radkovich and their attorneys, Mr. Shafer and Mr. Benedict, respectively, and Mr. Bray of Glens Falls and attorney Decker for Glens Falls [R. 241-242]. On June 7, 1948 [R. 420], after giving notice [Ex. 10], Woolley walked off the job and stayed off about one week [R. 262, 352]. Pursuant to demand of Radkovich in a letter to Woolley dated June 10, 1948 [Ex. F], and a reply letter from Woolley dated June 12, 1948 [Ex. 10], reserving all of his rights, Woolley returned to the job on June 14, 1948 [R. 425]. He completed the subcontract on October 6, 1948 [R. 200, 397].

Both contractor and subcontractor went broke on the job [R. 307-308 and 479]. The Government took the job over from Radkovich [R. 307] and Woolley had not paid Westinghouse which had supplied him with the electrical equipment [R. 196]. On or about April 10, 1948, West-

inghouse gave written notice to Radkovich that Woolley had not paid to Westinghouse a past due account in the sum of $34,514.05 for materials supplied to Woolley and used in connection with Woolley's work provided for in the electrical subcontract [Finding XII, R. 196-197]. Radkovich gave written notice to Glens Falls of this claim by Westinghouse on June 10, 1948 [Ex. F], which was more than 60 days after Radkovich had received the said notice from Westinghouse on April 10, 1948. So, while Woolley was completing the job, Westinghouse had notified Radkovich of Woolley's failure to pay for equipment and Radkovich had withheld further payments on the subcontract. Westinghouse sued Woolley on his purchase contract and Radkovich Sureties on a Miller Act bond provided by Radkovich. Woolley cross-claimed against Radkovich and Radkovich Sureties on the same bond. Radkovich and Radkovich Sureties cross-claimed against Woolley and Glens Falls, surety for Woolley, on two bonds provided by Woolley to Radkovich.

The continuity of the foregoing facts is most important for an understanding of the case. So we have not interrupted it by interspersing the facts relative to payments under the subcontract, but we now turn to this subject.

Both the prime contract and the subcontract provided for what we will refer to as progress payments. The prime contract provided that payments would be made to Radkovich each month of a percentage of the prime contract price equal to percentage of completion accom-

plished on the job less a 10% holdback [Ex. B, Art. 16]. The subcontract had a similar provision [Art. 3, R. 44]. The value of any materials on hand at the job site was to be taken into consideration in estimating percentage of completion of the job [Ex. B, Art. 16]. Each month the percentage of completion was estimated by the Resident Engineer (a Government employee, Mr. Fergason), with the aid of the contractor [R. 343].

The prime contract was made up of certain items. The Resident Engineer estimated the percentage of completion of each item. The electrical subcontract work was a portion of item three [R. 274]. But item three included electrical, plumbing, painting, cabinet work and the pouring of the cement house [R. 274-275, 283-284]. Thus the estimate officially made by the Resident Engineer would reflect the sum of the items making up item three. Theoretically then, the first estimate of the percentage of item three might include complete performance of the electrical work and only a very slight performance of the cement pouring, or any other combination of the various parts of item three to make up a given percentage of completion of the total item.

However, we know from the testimony of the witnesses as to the method of construction and the character of the electrical work that this could not be and was not the case [R. 283]. On the contrary, each house had the same amount of electrical wiring as every other house and the same was true of each item making up item three.

The cabinet work and the painting could not have started at the same time as the electrical work, but the proportion of the electrical work completed must have had a very close relationship to the proportion of item three completed. Due to materials on hand early in the contract, the electrical work percentage of item three may have been proportionately high.

The Resident Engineer voluntarily and unofficially furnished Radkovich with an estimate of the amount of money that he considered should be paid to Woolley each month [R. 288-290]. This was furnished on a slip of paper which has been destroyed [R. 290]. On the first estimate, the Resident Engineer certified to Radkovich in the unofficial way above described that $5,000.00 was due to Woolley [R. 289-290].

Woolley also produced an estimate showing $9,885.37 as the amount due to him at this time [R. 427, Ex. 13, ltr. dated Sept. 25, 1947]. This estimate indicated that the total was made up of materials on the job site and included no labor. Woolley was paid $5,000.00 on account of this estimate [R. 427, 262]. Woolley told Radkovich that "he couldn't operate unless he got $4,000.00 more" [R. 261-262, 291 and 125]. By separate check from the prime contractor, Woolley was paid $4,000.00 more [R. 262]. This, according to the testimony of Mr. Radkovich, was a loan and not an advance, although it is a fact that the $4,000.00 was taken out of amounts later concededly due Woolley [R. 262, 291-292, 428]. Woolley paid Rad-

kovich $500.00 which Mr. Radkovich and Woolley testified was interest demanded by Radkovich for the $4,000.00 [R. 262, 428].

The second estimate certified by the Resident Engineer was $15,000.00 [Ex. 2c]. Woolley's estimate submitted at this time was $16,551.09 [Ex. 13, ltr. dated Nov. 1, 1947]. Concededly this estimate by Woolley included all of the materials theretofore listed on the first estimate. From a comparison of the statements rendered by Woolley [Exs. 13a and 13b], it is apparent that Woolley included all of his expenditures for labor and materials in his second estimate [Ex. 13b]. He was paid $15,000.00 on account of this estimate [R. 428], making a total payment to that date of $20,000.00.

The third estimate submitted by Woolley was submitted upon a new and different basis at the request of Radkovich [R. 430-431] and acceded to by Woolley [R. 430-431]. This was on the basis of $390.00 per house, a unit method of payment rather than the progress method of payment provided for in the subcontract [Ex. C]. When this estimate was submitted, Mr. Radkovich told Woolley to accept $200.00 per house and that this was necessary because the Radkovich corporation was in financial trouble [R. 430-431]. Woolley thereupon agreed to the new method suggested and then accepted $3,000.00 which was a payment upon the unit price of $200.00 per house. That this was the unit basis agreed upon is further evidenced by the next estimate submitted by Woolley on the same basis [R. 431-432].

We believe that the foregoing statement of facts is sufficient for the purpose of considering the issues raised in this appeal.

IV.

The Questions Involved and the Manner in Which They Are Raised.

All of the questions involved were raised in Points on which Appellant Intends to Rely on Appeal [R. 523-533], excepting the question of jurisdiction of the court. These Points on which Appellant Intends to Rely on Appeal are repeated in this brief at Point V under the heading SPECIFICATION OF ERROR RELIED UPON, and they are numbered in the same way as they were numbered in the Points on which Appellant Intends to Rely on Appeal, so that the court, in turning to these points as referenced in the following questions, may turn to the equivalent numbers under Point V, which follows this listing of questions in this brief. The jurisdictional point has been added as Point 5 to the SPECIFICATION OF ERROR RELIED UPON.

1. Does the District Court Have Jurisdiction of the Controversy Raised by the Radkovich Cross-claim?

This question was raised in Point II above in this brief and apparently has not heretofore been considered. For argument concerning this question, see Point VII-1 following in this brief.

2. Does the Radkovich Cross-claim State a Claim Upon Which Relief Can Be Granted?

This question was first raised in the answer of cross-defendant Glens Falls [Sixth Affirmative Defense, R. 40]. The question was disposed of in the court's Memorandum of Conclusions [R. 127] in one sentence. It was disposed of in the findings, if at all, by the following sentence [R. 201]:

> "That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses."

This question was raised in Points on which Appellant Intends to Rely on Appeal, Point 1-A and B [R. 523-524]. For argument concerning this question, see Point VII-2 following in this brief.

3. **Can Recovery Be Predicated Upon the Payment Bond Since Cross-claimants Failed to Plead or Prove That They Have Suffered Any Loss or Damage?**

This question was raised in Points on which Appellant Intends to Rely on Appeal, Points 1-B [R. 524] and 3-A [R. 530]. It is not the subject of any finding or conclusion of law. For argument concerning this question, see Point VII-3 following in this brief.

4. **Was Glens Falls Released From Liability to Radkovich and Radkovich Sureties Because the Subcontract Was Materially Altered Without the Consent of Glens Falls, Woolley's Surety?**

This question was raised by the Second Affirmative Defense [R. 38], the Fourth and Fifth Affirmative Defenses [R. 39] and the Seventh Affirmative Defense [R. 40] of answer of cross-defendant Glens Falls. The question as such was not actually considered in the court's Memorandum of Conclusions and only incidentally disposed of in the last sentence of the findings [R. 201]. This question was also raised in Points on which Appellant Intends to Rely on Appeal, Points 2-D [R. 527-529], 2-E (b), (c), (d) [R. 530] and 3-B [R. 531-533]. For argument on this question, see Point VII-4 following in this brief.

5. **Can Recovery Be Predicated Upon the Performance Bond Notwithstanding Woolley's Complete Performance and the Failure of Radkovich to Comply With the Express Conditions Precedent to Recovery Therein Contained?**

This question was first raised by the affirmative defenses of the answer of cross-defendant Glens Falls. This question was treated as an issue by all parties throughout the trial, argued in the briefs upon which the case was submitted after the trial was over and was mentioned incidentally by the court in its Memorandum of Conclusions [R. 116]. The court found that Woolley fully performed the subcontract [Finding XIII, R. 197 and Finding XVI, R. 200], but did not otherwise specifically find on this issue. This question was raised in Points on which Appellant Intends to Rely on Appeal, Points 2-A, B and C [R. 524-527]. For argument on this question, see below in this brief, Point VII-5, 6, 7 and 8.

6. **Is Finding of Fact XVIII That Glens Falls Has Failed to Establish Any of the Allegations Relied Upon as Defenses, Unsupported by the Evidence?**

This question was raised in Point 2-E of Points on which Appellant Intends to Rely on Appeal [R. 529-530]. For discussion of this point in argument, see this brief, Point VII-8.

7. **Should the Payment Bond and Performance Bond Be Construed Together?**

This point was raised at the trial and treated as an issue by the trial court in its Memorandum of Conclusions [R. 116]. There was no finding on this question. For argument concerning this question, see this brief. Point VII-9.

8. **Must This Case Be Reversed Because of Error in Granting a Judgment Against Glens Falls for the Full Amount of the Westinghouse Judgment, Which Included Not Only the Obligations Assessable Against the Subcontract, but the Extras as Well?**

This question was raised in Points on which Appellant Intends to Rely on Appeal, Points 2-D(a) [R. 527] and 3-B(a) [R. 531]. For argument concerning this question, see Point VII-10 following in this brief.

V.
Specification of Error Relied Upon.

[This is a duplication of Points on which Appellant Intends to Rely on Appeal appearing in the record at pp. 523 to 533, except for the addition of Point V regarding jurisdiction.]

1. **The Cross-claim of Cross-complainants Fails to State a Claim Against Appellant Upon Which Relief Can be Granted in the Following Particulars:**

(A) Said cross-claimants failed to make any allegations showing liability of appellant and further failed to allege either compliance by Wm. Radkovich Company, Inc., or an excuse for non-compliance, with the express conditions precedent to liability of appellant on said Performance Bond.

(B) Said cross-claimants failed to make any allegations showing liability of appellant and particularly failed to allege that the obligee (Wm. Radkovich Company, Inc.) named in the Payment Bond suffered loss or damage while the said bond only obligated the appellant to "indemnify and hold obligee free and harmless from and against all loss and damage."

2. **The Judgment Against Appellant Cannot Be Predicated Upon Appellant's Performance Bond for the Following Reasons:**

(A) The trial court found in Findings XIII and XVI that E. B. Woolley, the principal on said bond, fully completed the work specified in the subcontract in question between Wm. Radkovich Company, Inc. and E. B. Woolley upon completion of which the obligation of appellant under the Performance Bond was to cease. Therefore, these Findings do not support Conclusion of Law II or the Judgment against appellant insofar as said Conclusion of Law and Judgment are based upon the Performance Bond.

(B) Evidence was introduced upon the material issue of fact raised by appellant at the trial that the obligee, Wm. Radkovich Company, Inc., failed to comply with the express conditions precedent contained in said Performance Bond and the court erred in failing to make findings upon the material issues of fact raised by the said express conditions precedent which are express conditions precedent to liability of appellant. Conclusion of Law II and Judgment against appellant are therefore not supported by the Findings.

(a) Evidence was introduced on the issue of compliance by the obligee with the express condition precedent in said bond which reads, "The said Surety shall be notified in writing of any act on the part of said Principal, or its agents or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, * * *" The trial court failed to make any finding upon the material issue

of fact of whether said condition precedent was complied with in two particulars: First, as to whether any notice was given to appellant when Wm. Radkovich Company, Inc. was advised by the principal, E. B. Woolley, that he was in financial difficulty and, Second, as to whether the giving of notice to appellant some sixty-one days after receiving the claim of Westinghouse Electric Supply Company for the payment of $43,514.05 for materials supplied to, but not paid for by E. B. Woolley is in compliance with said express condition precedent. In this respect the Findings are lacking on a material issue of fact necessary to support Conclusion of Law II and the Judgment against appellant.

(b) Evidence was introduced in many particulars relative to the performance and failure of performance of the subcontract by Wm. Radkovich Company, Inc. The trial court failed to make any finding as to whether Wm. Radkovich Company, Inc. well and truly performed and fulfilled all of the undertakings, covenants, terms, conditions and agreements of the said subcontract. An affirmative finding of such performance is necessary to sustain Conclusion of Law II and the Judgment against appellant because such performance is an express condition precedent to recovery against appellant upon the Performance Bond.

(C) Said cross-claimants failed to prove a material and substantial element of their claim in that they failed to show that E. B. Woolley had been paid according to the terms of the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley, thus failing to establish performance of express conditions precedent contained in said Performance Bond.

(It affirmatively appears from Finding XVIII that cross-claimants entirely failed to prove compliance with the first express condition precedent to the right to recover against appellant on the Performance Bond which condition is, "The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified." In Finding XVIII, the court found, "That there is no evidence from which the court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month." The burden of showing compliance with the subcontract, including payment in accordance with its terms, as an express condition precedent to recovery was on cross-claimants. Conclusion of Law II and the Judgment against appellant are therefore unsupported by the Findings and impeached by Finding XVIII.)

(D) Appellant was exonerated from liability upon said Performance Bond because after the execution of said bond, the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the knowledge or consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially

altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any materials were furnished by E. B. Woolley other than those purchased from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate that there were any "additions to the structures and improvements covered by said contracts."

The only rationale of the Findings is that the subcontract was altered by the addition of $8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written

exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to "extras" likewise impeaches Conclusion of Law II and the Judgment in that appellant's bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned. Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are therefore, not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that

there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

(E) That portion of Finding XVIII which reads, "That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses" is unsupported by the evidence in the following particulars more specifically detailed above:

(a) The cross-claim fails to state a claim against appellant upon which relief can be granted.

(b) The subcontract was materially altered by the parties thereto after the said bond was executed and without knowledge or consent of appellant.

(c) Payments were made by Wm. Radkovich Company, Inc. to E. B. Woolley before said sums were earned by E. B. Woolley.

(d) Wm. Radkovich Company, Inc. required E. B. Woolley to furnish extra and additional materials and to perform extra and additional work not called for by the subcontract.

3. The Judgment Against Appellant Cannot Be Predicated Upon Appellant's Payment Bond for the Following Reasons:

(A) Wm. Radkovich Company, Inc., the obligee under said Payment Bond has not suffered such loss or damage as appellant is bound to indemnify said obligee against.

(The Payment Bond being a bond of indemnity only, Wm. Radkovich Company, Inc., the obligee named in the

Payment Bond, is not entitled to recover against appellant unless he has paid the claim of Westinghouse Electric Supply Company. There is neither allegation nor evidence of such payment and there is no finding upon this issue which is a material issue of fact. Therefore, Conclusion of Law II and the Judgment are unsupported by the Findings.)

(B) Appellant was exonerated from liability upon said Payment Bond because after execution of said bond the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any materials were furnished by E. B. Woolley other than those purchased

from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate there were any "additions to the structures and improvements covered by said contracts."

The only rationale of the Findings is that the subcontract was altered by the addition of $8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event, they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to "extras" likewise impeaches Conclusion of Law II and the Judgment in that appellant's bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant

to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned. Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are, therefore not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

4. **The Performance Bond and the Payment Bond Should Be Construed Together and the Conditions Precedent to Recovery on the Performance Bond Should Apply Equally to the Payment Bond and All of the Points Relating to Conditions Precedent Which Appellant Has Specified Relative to the Performance Bond Apply Equally to the Payment Bond.**

5. **The District Court Lacked Jurisdiction of the Radkovich Cross-claim.**

VI.

Introduction to Argument.

The court expressly found that Woolley fully performed the subcontract. This finding would seem to be enough to justify the assumption that the judgment rests upon the payment bond. However, there is no finding or conclusion of law which by its express terms precludes the performance bond as a basis of judgment. This would seem to be sufficient to require discussion of the defenses to liability upon the performance bond. We have further reason. Appellant contends that the two bonds should be construed together because both are exclusively for the protection of Radkovich and if Radkovich has not seen fit to faithfully carry out his obligations to Woolley and to Glens Falls in matters substantially affecting the subcontract and the risk taken by Glens Falls, he should be barred from recovery.

Since the performance bond appears to be of secondary importance, we will first discuss those points of error which directly relate to the payment bond. Comments upon points relating exclusively to the performance bond will be treated with brevity. Appellant believes that the error relative to the points raised concerning both bonds is such as to require exoneration of Glens Falls from liability and that in any event the absence of findings on essential facts and uncertainty of other findings must at least compel reversal.

VII.
ARGUMENT.

1. The District Court Lacked Jurisdiction of the Radkovich Cross-claim.

a. Jurisdiction of the Controversy Is Lacking Unless the Radkovich Cross-claim Is Ancillary to the Westinghouse Action.

As already pointed out above, jurisdiction of the Radkovich cross-claim is dependent upon being ancillary to the Westinghouse action because it contains no jurisdictional statement. This conclusion results from the following analysis of the jurisdictional basis for this pleading.

The cross-claim is based upon private contract between Radkovich as obligee and Glens Falls and Woolley as surety and principal. The contract was in the form of a surety bond which is not required by any statute, law or ordinance. That there is not complete diversity between plaintiff, cross-claimants and cross-defendants is apparent from the fact that one of Radkovich's sureties, Excess Insurance Company of America, is a New York corporation, as is also Glens Falls, and the necessary jurisdictional statement regarding Woolley's citizenship and residence is absent.

b. If Ancillary to the Westinghouse Action at All, the Cross-claim Must Be Ancillary to the Miller Act Phase of the Westinghouse Complaint.

The Westinghouse action has two phases: The first phase is the Miller Act action against Radkovich and Radkovich Sureties. Jurisdiction for such an action is speci-

fically conferred by provision in the act itself and is not dependent upon the amount involved in the controversy or upon diversity of citizenship. The second phase depends upon diversity of citizenship for jurisdiction because this phase of the action is a simple suit upon the contract obligation of Woolley to Westinghouse.

Rule of Civil Procedure 13(g) provides for a cross-claim by one party againt a co-party arising out of the transaction or occurrence that is the subject matter of the original action, and 13(h) authorizes the court to order in a third party not a party to the original action if such third party is necessary to grant complete relief in the determination of a cross-claim. Rule 14 permits bringing in a third party who is or may be liable to a defendant for all or part of plaintiff's claim against such defendant. It should be observed that the Radkovich cross-claim does not arise out of the transaction or occurrence that is the subject matter of the second phase of the original action (between Westinghouse and Woolley). Moreover, by no stretch of the imagination could Glens Falls or Woolley be liable to Radkovich, nor would any duty which could be the basis for a claim between Radkovich and Radkovich Sureties on one side and Glens Falls and Woolley on the other arise out of a judgment obtained by Westinghouse against Woolley, so that the cross-claim could not be based upon the Westinghouse v. Woolley phase of the Westinghouse action under either rule.

However, there is an additional reason why the Radkovich cross-claim could not be based upon this second phase of the Westinghouse action. The District Court has no jurisdiction over this phase of the action because the Westinghouse complaint does not allege Woolley's citi-

zenship or residence. These jurisdictional facts must appear expressly in the complaint. (*Brown v. Ingraham* (D. C. Pa., 1951), 11 F. R. D. 522; *Bates v. United States* (D. C. Neb., 1948), 76 Fed. Supp. 57; *American Foman Co. v. United Dyewood Corporation* (D. C. N. Y., 1940), 1 F. R. D. 242.) With this possible basis for jurisdiction eliminated, the Radkovich cross-claim must depend upon being ancillary to the first phase of the Westinghouse action (Westinghouse v. Radkovich and Radkovich Sureties), which is based upon the Miller Act.

c. The Radkovich Cross-claim Is Not Authorized by Rule 13.

The meaning of the phrase "arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim" as used in Rule 13(g) is indicated by the Revisory Committee note regarding the 1948 amendment to this section which added the words "or relating to any property that is the subject matter of the original action." The note referred to reads as follows:

> "Subdivision (g). The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of rule 13 (g)."

As to this same matter, Barron and Holtzoff say at page 777, that this amendment permits cross-claims "which obviously are as closely germane to the action as

if they arose out of transaction or occurrence upon which the action is predicated." At page 776, the same authors say:

> "A defendant may assert a cross-claim against another defendant, provided it arises out of the plaintiff's claim or a counterclaim."

Applying the rule to our case it is apparent that the *transaction or occurrence* which is the subject matter of the original action is that which created the obligation of the defendants (Radkovich and Radkovich Sureties) on the Miller Act bond. The cross-claim relies upon the subcontractor's bond or bonds which were supplied pursuant to independent contract the obligation of which is independent of the prime contract and its requirement for a bond to comply with the Miller Act.

In point of time the prime contract was entered into before Woolley the subcontractor had even met Radkovich. In other words the cross-claim arose out of an entirely different transaction or occurrence than the one which gave rise to and is the subject matter of the original claim. Subdivision (h) of Rule 13 is dependent upon (g) for it merely authorizes the bringing in of a third party when necessary to grant complete relief upon a cross-claim authorized by (g). The upshot of this is that Rule 13 does not authorize the cross-claim in this case. The Radkovich cross-action must be authorized by Rule 14 if it is authorized at all.

d. General Limitations of Ancillary Jurisdiction.

Rule 13(h) specifically qualifies the bringing in of third parties authorizing such joinder only when it "will not deprive the court of jurisdiction of the action." Rule 14 is similarly qualified. Rule 82 contains a general

limitation upon interpretation of the rules as follows, quoting the rule in its entirety:

> "Rule 82. Jurisdiction and Venue Unaffected.
>
> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. As amended Dec. 29, 1948, effective Oct. 20, 1949."

Accordingly the question of whether a District Court has jurisdiction is governed by principles which are independent of the rules. (*American Foman Co. v. United Dyewood Corporation* (D. C. N. Y., 1940), 1 F. R. D. 171.)

The District Courts have taken jurisdiction over counterclaims and cross-claims where such claims could not have been originally brought as independent actions in the federal court because they lack the necessary jurisdictional basis, such as a federal question or diversity of citizenship. These courts have held that the settlement of such matters as are presented by counterclaims and cross-claims is incidental to the determination of the original controversy. The general principle is that if the dog is to be let in, his tail must come along as well. An example of this situation is *Millsap v. Lotz* (D. C. Mo., 1951), 11 F. R. D. 161.

The true cross-claim and compulsory counterclaim have been recognized as ancillary to the main action. Barron and Holtzoff in volume 1 of Federal Practice and Procedure (Rules Edition), commencing at page 781, point out:

> "A counterclaim or cross-claim arising out of the transaction or occurrence that is the subject matter of the original action or counterclaim therein, or

relating to property that is the subject matter of the original action, may be adjudicated even though independent grounds of federal jurisdiction do not exist. This is no departure from former decisions of the Supreme Court. It was long the rule in equity practice."

But they further state, commencing at page 783:

"The law is otherwise with respect to permissive counterclaims.

"A permissive counterclaim must be supported by independent grounds of federal jurisdiction. *Cross-claims wholly independent of the main issues of the original action are not authorized by the rules and there is no basis for asserting ancillary jurisdiction with respect to them.*" (Emphasis added.)

To bring in Glens Falls, it is necessary to rely upon Rule 14(a). This rule authorizes impleading a third party who is to be referred to as a third party defendant. The moving party to such a proceeding is to be known as a third party plaintiff and his pleading is a third party complaint. This type of impleader should be distinguished from the cross-claim authorized in Rule 13. Unless this distinction is borne in mind, application of the various cases will not be clearly and easily understood. The Radkovich cross-claim has been misnamed. The parties should be known not as cross-claimant and cross-defendant as denominated, but as third party plaintiff and third party defendant. Appellant Glens Falls asserts that the Radkovich cross-claim is an attempt at impleader which is wholly independent of the issues of the original action

and that there is no basis for asserting ancillary jurisdiction with respect to it. See 45 Yale L. J. 393, 420.[1]

e. Specific Limitations of Ancillary Jurisdiction in Cases Brought Under the Miller Act.

Actions brought pursuant to authorization of the Miller Act which requires neither diversity of citizenship nor a specific amount in controversy are to be distinguished from the diversity cases because of the different character of the action, not because different principles apply. Reasoning consistent with the foregoing principles moved the court to permit a compulsory counterclaim where the main action was brought under the Miller Act in *United States v. Silken* (D. C. N. D. Ohio, 1943), 53 Fed. Supp. 14.

The reason for this is quite obvious. A subcontractor sued a prime contractor and his surety under the Miller Act. The contractor counterclaimed to set off against the plaintiff's claim a breach of contract by the subcontractor. Of course, if the counterclaim were successful, it would defeat the plaintiff's recovery under the Miller Act and so was directly concerned with the subject matter of the original action. Any possible recovery on the counterclaim over and above the amount set off against the plaintiff's claim was strictly incidental. It was consequently held to be ancillary.

These principles are exemplified in *United States v. John A. Johnson* (D. C. D. Maryland, 1945), 65 Fed.

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[1]"In the small number of reported cases that have thus far dealt with the impleader of third persons to answer a claim of indemnity or contribution by a defendant, it has been uniformly held that the impleader is not available unless grounds for jurisdiction, independent of the main action, support the claim against the third person."

Supp. 514, where in the absence of independent grounds of jurisdiction the court refused to entertain a counter-claim for damages by the subcontractor against the contractor in an action originating under the Miller Act because the claim was not based upon supplying labor or materials to the contract, and had no effect upon any claim to recovery on the bond. This case is consistent with *United States v. American Surety Co. of New York* (C. C. A. 2d, 1944), 142 F. 2d 726, which was thoroughly discussed in the case last cited.

Beyond this point no court has gone in any case involving the Miller Act. The reason is that the subject matter of a Miller Act case is the bond. To permit the joinder of any claim which has no independent jurisdictional basis would be to construe Rule 13 or 14 to extend the jurisdiction of the United States District Courts in violation of Rule 82 which is the governor upon the interpretive machinery.

The courts have so held. We quote from *United States v. Biggs* (D. C. E. D. Ill., 1942), 46 Fed. Supp. 8, an opinion written by the Honorable Walter C. Lindley who since writing the opinion as a District Judge has become Circuit Judge in the Seventh Circuit. He bases his decision upon an opinion written by Circuit Judge William Denman with Circuit Judges Curtis D. Wilber and Clifton Mathews concurring. Quoting from pages 11 and 12 of the opinion:

> "Further, an examination of the Miller Act, 40 U. S. C. A. Section 270a et seq., indicates that the sole purpose of the Act is to protect the subcontractor, and not to provide a basis for recovery between the contractor and a third person. In Seaboard

Surety Co. v. United States, 9 Cir., 84 F. 2d 348, 350, the court, speaking of the scope of the Heard Act, 40 U. S. C. A. Section 270, the predecessor of and substantially the same as the Miller Act, said: 'It is our opinion that the statute upon which the United States brings suit on behalf of the suppliers of labor and material to the principal contractor does not contemplate anything more than adjudicating the obligation to such suppliers flowing from the bond given by the principal contractor and his surety. While the statute must be liberally construed for the purpose of protecting the claims of such suppliers, Fleischmann Const. Co. v. United States to Use of (G. W.) Forsberg, 270 U. S. 349, 46 S. Ct. 284, 70 L. Ed. 624, liberality of construction for their protection does not warrant an expansion of adjudicatory power to include controversies between other parties. It is a statutory remedy and gives no equitable jurisdiction whatsoever. So far as the statute contemplates a single action in which there may be tried the several causes of action of these suppliers, it is not designed to avoid a multiplicity of suits beyond the area of these suppliers' causes of action.'

Inasmuch as the proceedings is statutory in character and vests in the District Court no general jurisdiction as in equity or law, but only jurisdiction over certain specified claims, Rules 13 and 14 have no application and counterclaims against the United States no place in the picture. To permit the claim against the United States would be to render an affirmative judgment against the United States on a counterclaim which, in the light of prevailing reasoning, is no part of the statutory proceedings. United States v. Shaw, supra; United States v.

> Nipissing Mines Co., supra; United States v. Eckford, supra . . .
>
> The refusal of defendant's counterclaim does not do violence to the rules of Civil Procedure, since authority to make rules of procedure for the exercise of jurisdiction does not enlarge jurisdiction. United States v. Sherwood, 312 U. S. 584, 589, 61 S. Ct. 767, 85 L. Ed. 1058. In fact, Rule 13(d) expressly states that counterclaims against the United States will not be allowed beyond the limits fixed by law."

The Heard Act was the predecessor to the Miller Act and the appropriate section was 40 U. S. C. A. 270. The character of the action therein authorized is indistinguishable from the character of the action authorized by the present law. The cases decided under the Heard Act concerning the nature of the action therein authorized are therefore authority for the same proposition under the Miller Act.

We refer to certain cases on this subject which were decided before the adoption of the new federal rules, but all of these cases go to the question of jurisdiction rather than procedure. The new rules do not enlarge the jurisdiction of the District Courts and consequently do not qualify the controlling principles of these cases.

Quoting from *United States v. Landis & Young* (D. C. W. D. La., 1936), 16 Fed. Supp. 835:

> "This proceeding was filed under the Heard Act, 40 U. S. C. A., Section 270. The defendant contractor, Landis & Young, intervened and seeks judgment against one of its subcontractors and the surety on the latter's bond for an alleged overpayment. The subcontractor and its surety have moved to

dismiss the intervention for the reason that such demands cannot be liquidated here.

As pointed out by this court in United States ex rel. General Iron Works v. Maples et al., 6 F. Supp. 354, and United States ex rel. Buckelew Hardware Co. v. Union Indemnity Company, 6 F. Supp. 360, in a proceeding of this kind only claims against the funds due by the government to its contractor and upon the bond of the latter can be litigated; it is in the nature of an action in rem as to those funds and upon that bond, which cannot have ingrafted upon it claims against the sureties of subcontractors. If a claimant for material or labor intervenes, then I see no reason why either the general contractor or a subcontractor may not answer and contest the correctness of such claim, pleading credits or offsets thereto for the purpose of establishing the just amount due the claimant; but, as to all demands by the contractor against subcontractors and their sureties, the same are relegated to an independent proceeding.

For the reasons assigned, the motion to dismiss should be sustained."

The principal application to the issue under discussion is well defined in the following quotation from *United States ex rel. General Iron Works Co. v. Maples* (D. C. W. D. La., 1934), 6 Fed. Supp. 354, at p. 358:

"This is a statutory proceeding (Title 40, §270, U. S. C. [40 U. S. C. A., §270]) upon the bond required to be given to take the place of the lien which the furnishers of labor and material would have against the work in the case of a private individual. There can be no lien upon government property, and it cannot be sued without its consent.

Anyone having a claim against the contractor with the government, after certain delays and after its failure to sue, may proceed in the name of the United States upon the bond which the law requires the government to exact in letting public works. It provides that there shall be but one suit, and 'any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work' may sue or intervene in the proceeding after it has been instituted, regardless of the amount of the claim. It cannot be commenced until after the completion of the work and final settlement by the government, and then not later than one year thereafter. 'If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery.' The fact that it is required to be brought in the name of the government carries the idea that the claimants authorized to sue on the bond shall, in effect, occupy the position of the United States, if it were compelled to pay the furnisher of labor and materials to discharge a lien. In other words, it substitutes them in place of the government, and reasonably contemplates that the proceedings shall be limited to and determined by the rights of all parties in and under the bond or obligation given to the United States. To this extent it is in the nature of a proceeding in rem on the bond. To ingraft either a contractual or legal claim or controversy between these claimants and a third person, such as the surety on a subcontractor's bond, who has voluntarily appeared or under process been brought into the matter, and as to whom the government has no interest and is not privy, would, I think, go beyond the purpose of the law and bring in persons and parties who could not otherwise, because of citizenship, etc., be sued in

> this court, under the limited jurisdiction conferred by this statute. I see no reason why anyone having claims which, but for the fact that those were public buildings, would have had a lien thereon, may not avail himself of the benefits of the statutory bond, but, as to those bonds given by subcontractors to persons other than the government (which are not required by law), claimants are relegated to the normal remedies and proceedings which exist in suits to which the government is not a party."

To restate the general principle which we have seen is applicable specifically to the Miller Act cases, we quote from Vol. 1 Federal Practice and Procedure by Barron and Holtzoff, page 858:

> "The claim against the third-party defendant must be that of the original defendant, but it must be based upon the plaintiff's claim against the original defendant."

An agreement of indemnity between Radkovich as obligee and Glens Falls and Woolley as obligors is in its nature entirely separate and apart from the subject matter of the original action.

f. The Radkovich Cross-claim Is Not Authorized by the Rules.

We wish to make one further point. We will show below that the Radkovich cross-claim fails to state a claim upon which relief can be granted for the reason, among others, that it does not appear from the cross-complaint that if a judgment is rendered in favor of Westinghouse against cross-claimants Radkovich and Radkovich Sureties the cross-defendants Woolley and Glens Falls will be or might be liable to cross-claimants for any or all of it. Under such circumstances, the cross-claimants have not

brought themselves within the compass of Rule 14 and therefore the attempt at impleader is not authorized by the rules at all.

2. The Cross-claim of Radkovich and Radkovich Sureties Fails to State a Claim Upon Which Relief Can Be Granted.

This point was raised by special defense in the answer of Glens Falls [Sixth Affirmative Defense, R. 40], but was given only perfunctory consideration by the trial court [Memorandum of Conclusions, R. 127, and if mentioned at all in the Findings or Conclusions, by the last sentence of the Findings, R. 201].

a. The Radkovich Cross-claim Omits Any Allegation of Liability or From Which Liability May Be Inferred.

The Radkovich cross-claim appears at page 18 of the record. The substance of the claim consists of the following allegations:

Paragraph VII [R. 20]—Radkovich was awarded the contract for the construction of temporary family quarters at Muroc Army Air Field by contract dated June 19, 1947.

Paragraph VII [R. 21]—Radkovich Sureties furnished a standard form payment bond pursuant to the Miller Act providing that unless Radkovich should promptly pay all persons supplying labor and materials in the prosecution of the work, the obligation of the sureties will remain in force. Radkovich joined in the execution of the bond as principal.

Paragraph IX [R. 22]—Radkovich performed the contract and in the performance employed Woolley as electrical subcontractor.

Paragraph X [R. 23]—Glens Falls executed and delivered to Radkovich a payment bond by which it agreed that unless Woolley would indemnify and hold Radkovich free and harmless from and against all loss and damage by reason of his failure to pay persons supplying labor and materials used in the prosecution of the work provided for in the subcontract, then the bond would remain in full force and effect. Glens Falls also delivered a performance bond conditioned upon full performance of the subcontract by Woolley.

Paragraph XI [R. 25]—Woolley entered upon performance of the subcontract and installed certain electrical equipment purchased from Westinghouse Electric Supply Company, but failed to pay the whole purchase price, leaving a balance due to Westinghouse. This paragraph also contains an averment that Radkovich still owes $16,562.54 to Woolley which is the unpaid balance of the subcontract price.

Next follows the prayer asking that if Westinghouse obtains a judgment against Radkovich and Radkovich Sureties that they have judgment over against Glens Falls and Woolley for any amount in excess of the balance of the purchase price.

To summarize, Radkovich and Radkovich Sureties show grounds for their liability to Westinghouse and state that Woolley put up a performance bond and a payment bond to Radkovich. This is all that is said. There is no causal connection between these facts and the demand of the prayer. There is no statement to the effect that cross-complainants are entitled to any relief based upon Woolley's bonds.

The numbered paragraphs following in this point specifically detail the defect as it applies to the performance

bond and to the payment bond and point out that this is a defect going to the merits, and is not just a technical defect. It may be said, however, that such a causal connection is required by Rule 8(a). In other words, no circumstances are alleged which show a right of recovery. The rules require a short plain statement of the claim showing that the pleader is entitled to relief. The Radkovich cross-claim contains no statement of any kind showing that the pleader is entitled to relief. This element cannot be omitted.

See *Patten v. Dennis* (C. C. A. 9, 1943), 134 F. 2d 137, wherein the court affirmed a judgment of the District Court dismissing the action for failure to make a plain statement showing that the pleader was entitled to relief. The court said at page 138:

> "The requirements of a complaint may be stated, in different words, as being a statement of facts showing (1) the jurisdiction of the court; (2) ownership of a right by plaintiff; (3) violation of that right by defendant; (4) injury resulting to plaintiff by such violation; and (5) justification for equitable relief where that is sought. See: United States v. Humboldt Lovelock Irr. Light & P. Co., 9 Cir., 97 F. 2d 38, 42; United States v. McIntire, 9 Cir., 101 F. 2d 650, 653. The complaint is completed by a demand for relief.
>
> Regarding the first conceivable cause of action mentioned above, the complaint, even as supplemented by other parts of the record, fails to allege facts showing a violation of any right owned by appellant by Smith, Bogard and Larsen, or that appellant was injured thereby. Smith, Bogard and Larsen are not parties to this case, but since appellant suggests that they be made parties, we have discussed such con-

ceivable cause of action as if they were already parties. So considered, no cause of action against Smith, Bogard and Larsen has been stated."

See also *Pierce v. Wagner* (C. C. A. 9, 1943), 134 F. 2d 958, where the same principle is enunciated.

The same result was reached in the 8th Circuit. See *Mitchell v. White Consolidated* (C. A. 8, 1949), 177 F. 2d 500. There the court said at page 503:

> "That Rule 8(e) authorizes pleading proximate cause as an ultimate fact seems obvious, but the Rule does not alter the substantive requirement that, in Indiana, in an action for negligence, the existence of a causal relationship between the negligence charged and the damage alleged must be shown by averments of fact before the complaint can be said to state a good cause of action. Baltimore & O. S. W. R. Co. v. Burtch, 192 Ind. 199, 134 N. E. 858; Indianapolis Abattoir Co. v. Neidlinger, 174 Ind. 400, 92 N. E. 169. See also 45 C. J. 1093 and cases there cited. We find no such causal relationship in the averments of the complaint now before us."

And further on the same page:

> "Defendant's duty was to protect the public against obstructions, barricades, or other dangerous conditions created by it in the performance of its work as a contractor, 43 C. J. 1113; the extent of this duty and the manner in which it was to be discharged were clearly set forth in the Indiana statute, Sec. 36-1605 et seq., Burns' Ind. Sts. 1933, and it is upon a violation of that statutory duty that plaintiffs' action must stand or fall. No averments of the complaint express or imply any other fact out of which it can be said that the injuries complained of arose. Plain-

> tiffs' claim discloses no causal relationship between the failure to have a red light and the injuries to plaintiffs."

As in Indiana, California requires that a causal connection appear and that all the elements necessary to show a right to relief appear. This is so fundamental that it has required no more than passing comment. We quote from 21 Cal. Jur. 59:

> "Every complaint should be founded upon a theory under which the plaintiff is entitled to recover, and should state all the facts essential to support such theory. The complaint should state every fact which, if controverted, the plaintiff will be compelled to prove in order to maintain the action."

In *Quilty v. United Fruit Co.* (D. C. N. Y., 1946), 6 F. R. D. 216, it was held that a third party complaint which was so lacking in details as to necessitate recourse to the principal complaint was subject to dismissal. Even reference to the Westinghouse action does not cure the defect of the Radkovich cross-claim. In the case of *Oppenheimer v. F. J. Young & Co.* (D. C. N. Y., 1943), 3 F. R. D. 220, at 226, the judge expresses his opinion on the rule as follows:

> "There is another aspect: It strikes me that the requirement in rule 8(a)(2), that a complaint show 'that the pleader is entitled to relief,' is infringed by omission from the amended complaint of any material portion of what the pleader relies on."

The 7th Circuit points out the deficiency of a complaint in a manner which illustrates the defects in the cross-claim presently before the court, in *Pelelas v.*

Caterpillar Tractor Co. (C. C. A. 7, 1940), 113 F. 2d 629, 631:

> "Rather it was an action for money had and received, and in order to constitute a valid cause of action, it was essential that it disclose something in the relationship between plaintiff and defendant, either under an express contract or under facts raising an implied contract, whereby it could be said, as a matter of law, that defendant had received money which it should and was legally bound to pay to plaintiff. . . ."

We omit from the quotation commenced above the court's statement of what the complaint before it averred. The paragraph is concluded as follows:

> "There was, therefore, before the court nothing in the way of facts pleaded, by virtue of which it would be said as a matter of law that defendant owed plaintiff anything."

And further in the opinion, the court made the following statement at page 632:

> "The court rightfully held that before plaintiff could recover, it was necessary for him to show by some contract either express or implied, a liability upon the defendant to pay plaintiff. Failing to do so, the complaint was fatally defective."

This same interpretation of Rule 8(a) appears in *Caribe Candy Co. v. Mackenzie Candy Co.* (D. C. N. D., Ohio, 1948), 78 Fed. Supp. 1021, 1022, as follows:

> "The Federal Rules extend the utmost liberality to litigants with respect to forms of pleadings and require only 'short plain statements' of their causes of action. Rule 8(a), 28 U. S. C. A. following section 723c . . . The Rules should not be so liberally

construed that a plaintiff may merely hint that he is alleging breach of contract without actually making such an allegation.

Defendant's motion to dismiss will be granted (without prejudice) on the ground that the complaints (both original and supplemental) fail to state of claim upon which relief may be granted."

We turn now to specific defects of the complaint which should be considered in the light of the authorities above cited.

b. No Right to Recovery Under the Performance Bond Either Appears or Can Be Inferred Because (1) There Is No Allegation That Radkovich Complied With the Subcontract or That Woolley Failed to Perform, and (2) There Is Neither Allegation nor Excuse for Non-performance by Radkovich of Express Conditions Precedent Contained in the Performance Bond.

The allegations of the complaint referring to the performance bond [R. 24] show that the bond would be void if the principal, Woolley, shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of the subcontract and of any and all duly authorized modifications of said subcontract. There is no allegation in the cross-claim that the said terms of the performance bond were not fully met by Woolley and, therefore, from all that appears in the complaint the obligation would be of no force and effect and cross-complainants have shown no right to recover thereunder.

While the foregoing observation should be sufficient to defeat any attempt at recovery on the cross-claim as stated in the pleading itself, there are other conditions actually contained in the performance bond which were not men-

tioned by the cross-claim. The performance bond in its entirety appears in the record as Exhibit B of the answer of Glens Falls, commencing at page 50 through page 54, wherein it appears that the bond was executed upon certain conditions precedent to the right of recovery by Radkovich [R. 52]. We mention these conditions precedent because of the relationship of Rule 15(b) to the presentation upon appeal of the objection that the cross-claim does not state a claim upon which relief can be granted.

The record discloses that while Glens Falls urged the conditions precedent as affirmative defenses to recovery on the cross-claim, the issue cannot be considered to have been litigated since the court has made no finding of fact or conclusion of law with respect to the performance of the conditions precedent by Radkovich or of the compliance by Radkovich with terms of the subcontract or excuse for non-performance by Radkovich of either the terms of the subcontract or of the express conditions precedent contained in the performance bond.

c. No Right to Recovery Under the Payment Bond Appears Because There Are No Allegations of Loss or Damage Having Been Suffered by Cross-claimants Radkovich and Radkovich Sureties.

The allegations concerning the execution and contents of the Woolley-Glens Falls payment bond are contained in paragraph X [R. 23] of the cross-claim wherein it affirmatively appears:

> ". . . it is agreed that if the principal shall indemnify and hold the said obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay all persons supplying labor and materials used in the prosecution of the work

provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect."

In paragraph XI [R. 25] it is alleged that Woolley failed to pay Westinghouse but there is no allegation that cross-claimants or either of them sustained any loss or damage by reason thereof.

The payment bond is an indemnity bond against loss or damage as defined in California Civil Code, Title XII. Section 2778 of said title provides rules for interpreting an agreement of indemnity and distinguishes between indemnity against liability and indemnity against claims or demands for damages or costs. As to the latter, Section 2778 says:

"In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: . . .

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified *is not entitled to recover without payment thereof;* . . ." (Emphasis added.)

It is therefore apparent from the plain and unequivocal language of the Civil Code that the payment bond cannot be the basis for recovery by cross-claimants until cross-claimants are able to allege that they have paid the claim of Westinghouse. Since it appears neither from the cross-claim that such payment has been made nor from any place in the entire record that such payment has been made, the cross-claim is fatally defective in this respect.

Moreover, for the reasons just stated, it is obvious that the issue has neither been raised nor litigated in the course of the trial.

That the law of the State of California is, as plainly stated in the Civil Code, is apparent from the case of *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 688, 33 P. 2d 433, from which we quote commencing at 138 Cal. App. 688:

> "In 13 California Jurisprudence, page 987, the distinction between a bond against liability and an indemnity contract against loss or damages is clearly enunciated. We quote therefrom: 'The distinction between an undertaking against "liability" and the strict contract of indemnity against "loss" is that between contracting that an event shall not happen, and contracting to indemnify against the consequences of the event if it should happen. A liability is not a damage, according to the signification of that term as employed in contracts of indemnity, and it has been said that courts have no authority to insert the term "liability" in a contract, and then proceed to enforce the contract as they—but not the parties—have made it. A bond indemnifying a person against loss and liability takes effect from its delivery, and its legality is to be determined by reference to the state of things then existing.' And then, on page 991 of the same volume, section 12, the rule is clearly stated that the right of action upon a bond indemnifying against loss or damage accrues only, and at the time when the indemnitee suffers actual loss by being compelled to pay, and the actual payment of damages. The authorities cited in the footnotes so fully support the text which we have quoted that further attempts to distinguish between a bond insuring against liability

and one insuring against loss or damages is unnecessary. *Nor is it necessary to cite further authorities that before an action can be begun upon a contract of indemnity insuring against loss or damages the damages must have been paid as required by subdivision 2 of section 2778 of the Civil Code.*" (Emphasis added.)

We respectfully represent that not only has no allegation been made which is sufficient to state a claim relying upon the payment bond, but we assert, and it appears to be obvious, that no such allegation could have been made during the course of these proceedings. It is a matter of interest to note that in order to state a claim under the payment bond, it would be necessary for the cross-claimants to make payment to Westinghouse. Then the Westinghouse action would no longer present a justiciable issue and the cross-claim which is dependent for jurisdiction upon being ancillary to the main action would have to be dismissed for lack of jurisdiction.

d. The Issues Not Raised by the Pleadings Were Not Litigated so as to Cure the Defects in the Pleadings Pursuant to Federal Rules of Civil Procedure, Rule 15(b).

We are not unmindful of the provision of Rule 15(b):

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

We have, however, pointed out above in respect to each specification of deficiency in this pleading that the issues not raised by the pleadings were not litigated in the course of the trial. To summarize the defect in this cross-claim, it fails to present any controversy.

3. Recovery Cannot Be Predicated Upon the Payment Bond Because Radkovich, the Obligee, Produced No Evidence That He Suffered Any Loss or Damage.

This point is responsive to Points on Appeal 3-A [R. 530] and Specification of Error Relied Upon listed under Point V-2 of this brief which specifications of error are the same as the points on appeal. It has already been pointed out that the payment bond is an indemnity bond and that under California Civil Code, Section 2778 and the authority of *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 33 P. 2d 433, the person indemnified is not entitled to recover without payment of the loss or damage indemnified against.

We have also pointed out that the cross-complaint is fatally defective for failure to allege payment by Radkovich of the loss or damage against which the bond indemnifies Radkovich. Not only is this true, but the record discloses not one bit of evidence of such a payment. As a consequence, cross-claimants have failed to prove a right to relief and have failed to establish any legal right to recovery.

In the face of this complete failure of proof, the court concluded in Conclusion of Law II [R. 201] that Radkovich and Radkovich Sureties are entitled to judgment against Woolley and Glens Falls in the same total sum of principal and interest to which Westinghouse was adjudged to be entitled and the judgment against Woolley and Glens Falls was based directly upon this Conclusion of Law.

There is no finding of fact made by the court to support Conclusion of Law II and, therefore, Conclusion of Law II is unsupported by the findings and the evidence.

Appellant is entitled to a finding or findings of fact which will sustain a conclusion that cross-claimants are entitled to judgment.

Rule 52(a) provides that the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. It also provides:

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

There was in this case no opinion or memorandum of decision such as contemplated in Rule 52.

The *Memorandum of Conclusions* [R. 91-151] in this case was dated September 26, 1951, and accompanied by a Minute Order of the same date [R. 151] directing the preparation of findings, conclusions and judgment by counsel. Four months later, findings, conclusions and judgment were prepared by the court and signed February 7, 1952 [R. 193-205].

During the interval between the date of the memorandum and Minute Order and the signing of the findings, conclusions and judgment, there were drafted and submitted proposed [R. 156] and second proposed [R. 177] findings of fact and conclusions of law and eight letters were exchanged between various counsel and the trial judge. Thereafter, under date of February 7, 1952, a further *Memorandum Re Proposed Findings, Conclusions and Judgment and Objections Thereto* [R. 152-155] was prepared by the court, clearly indicating that the original memorandum was subject to correction and was to be used as a basis for preparation of the findings, conclusions and judgment, but was not intended as a substitute therefor.

It further appears that the court reserved a right to alter his opinion with respect to the various matters covered therein. The last memorandum was in the nature of an explanation and disposition of counsel's correspondence. These memoranda do not have finality and conclusiveness of a memorandum of decision such as mentioned in Rule 52(a).

Barron and Holtzoff in Volume 2 of Federal Practice and Procedure, page 828, say:

> "Statements in an opinion which is not regarded or intended as embracing findings of fact and conclusions of law cannot control, modify or impeach the findings or decision."

And cite:

> *American Insurance Co. v. Lucas* (D. C. Mo., 1941), 38 Fed. Supp. 926, appeals dismissed 62 S. Ct. 107, 314 U. S. 575, 86 L. Ed. 466, certiorari denied 63 S. Ct. 257, 317 U. S. 687, 87 L. Ed. 551.

It is nevertheless worthy of note that the *Memorandum of Conclusion* of the trial court [R. 91-151] contains no statement which in any way intimates the existence of any fact which might be considered to support the substantive rule of law above stated and which would justify a conclusion of law that cross-claimants are entitled to judgment against appellant.

The appellate court may reverse or vacate a judgment and remand the case for further findings if the trial court fails to make findings of fact as required by Rule 52(a). In the case of *Paramount Pest Control Service v. Brewer* (C. A. 9, 1948), 170 F. 2d 553 at 554, the court said:

> "The record before us is devoid of findings of fact upon such essential issues in the suit.

> This court of appeals has no power ab initio to consider under the record before it the issue of conspiracy or the concomitant claim for damages."

However, if the record discloses that there is no evidence upon which such a finding can be made, and in addition shows that the circumstances are such that no such finding could be made in the action, particularly without loss of jurisdiction of the entire controversy, the appellate court cannot sustain the judgment, and, we respectfully submit, has no alternative to reversal.

See *Burman v. Lenkin Const. Co.* (1945), 149 F. 2d 827 (80 A. D. C. 125), a *per curiam* opinion in which the court states at page 828:

> "We have carefully read and considered the entire record, and while we think it is always desirable, on a trial to a judge without a jury, that the facts should be found to aid us in understanding the basis of the decision, we are nevertheless of opinion that here the record considered as a whole does not present a genuine issue as to any material fact—in view of which it would be both a waste of time and a needless expense to send the case back to the District Court for special findings of fact."

We have already noted that the express provision of California Civil Code, Section 2778, provides that the person indemnified *is not entitled to recover* without payment of the loss or damage concerning which a claim of indemnity is made and we have pointed out that the courts of California have clearly and unequivocally confirmed this section as the law of California without exception, but we wish to point out in addition that such a result is reasonable and is the result contemplated by the parties to this payment bond.

As pointed out in *Ramey v. Hopkins, supra,* the "courts have no authority to insert the term 'liability' in a contract, and then proceed to enforce the contract as they—but not the parties—have made it." It is the way of the world that in private contracts each party looks only to his own protection and the courts have no authority to extend the risk of contract beyond the terms plainly provided. Consequently, no right of action was alleged, was shown to exist, or was proved, and Conclusion of Law II and the Judgment cannot be sustained based upon the payment bond.

4. Since the Subcontract Was Materially Altered Without the Consent of the Surety, There Can Be No Recovery on the Radkovich Cross-claim Either on the Payment Bond or the Performance Bond.

This point is responsive to Points on Appeal 2-D-b and 3-B-b and to Specification of Error, Point V of this brief, 2-D-b and 3-B-b and Point IV-4 and 5 of Questions Involved.

a. The Rule That Alteration of Contract Without Consent of a Surety Releases the Surety From Liability Is Well Established and Rests Upon Sound Legal Principles.

California Civil Code, Section 2819 reads as follows:

> "A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

See *Shuey v. Bunney* (1935), 4 Cal. App. 2d 408, 40 P. 2d 859, wherein the court based its decision upon the

foregoing code section. The court held that a change in a contract, the performance of which was secured by a surety bond, released the surety.

In the instant case there is both a surety bond (the performance bond) and an indemnity bond (the payment bond). But there is no distinction between the two insofar as the application of the foregoing rule is concerned (8 Cal. Jur. 2d 647). An alteration of the contract between the principal (Woolley) and the obligee (Radkovich) releases the surety from liability. See *Josephian v. Lion* (1924), 66 Cal. App. 650, 660, 227 Pac. 204. In that case the court said:

> "The authorities are to the effect that the doctrine of exoneration, in equity, applies as well to contracts of indemnity as to those of suretyship."

The essence of a contract of suretyship and the basis upon which the surety is released from responsibility if the principal and the obligee alter the contract regarding which the surety bond is given is well stated in the case of *County of Glenn v. Jones* (1905), 146 Cal. 518, 520, 80 Pac. 695:

> "The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights. He must not omit to do any act required by the surety which duty enjoins him to do, if such omission injures the surety. The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner and

> under the circumstances pointed out in his obligation, he is bound, and no father *(sic)*. He has a right to stand on its very terms."

The general principle of good faith and confidence between the parties to act in such a way as to do nothing and omit nothing which might affect the liability of the surety is a general principle of law which is applicable to all contracts of suretyship, including contracts of indemnity, whether they contain express conditions precedent or not.

The denomination of the indemnity bond in this case as the "payment bond," is not determinative of its character. It must be borne in mind that the payment bond is provided pursuant to contract and is what is termed a "common law bond" as distinguished from a "statutory bond." The fundamental distinction between the two is that statutory bonds denominated payment bonds are provided pursuant to a statute, the declared purpose of which is to protect the rights of third parties. The law requires that a bond furnished pursuant to statute comply with the purpose of the statute. The provisions of the statute will be read into any bond furnished in compliance therewith so as to make the contract a third party beneficiary contract available to suppliers of material or labor when the statute so provides, regardless of the provisions of the bond itself. In the instant case, the payment bond is limited by its own terms and is not governed by the statute.

The performance bond is similarly governed exclusively by its own terms rather than by statute. It was not furnished for the benefit of third parties, but was expressly furnished for the benefit of Radkovich exclusively.

We quote from the bond appearing at page 53 of the record:

> "No right of action shall accrue under this bond to or for the use of any person other than the Obligee named herein."

The only obligee named in the bond is Radkovich.

The payment bond is similarly conditioned since by its terms it runs to Radkovich as the obligee and as already observed contains the following provision, quoting from page 50 of the record where a copy of the bond appears:

> "Now, Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation be null and void, otherwise to remain in full force and effect."

The clear intent of this provision is to provide a bond for the protection of Radkovich only. Moreover, when read in connection with Civil Code, Section 2778, Subsection 2, it is clear that the law gives full weight to this intention.

As a consequence, this common law payment bond is an indemnity bond for the protection of the obligee only. We call attention to this fact in order to avoid any confusion with cases interpreting statutory bonds which are ultimately governed primarily by the provisions of the statute rather than by the terms of the bond and in the usual case arise through the suit by a third party who seeks compensation for materials or labor supplied and not paid for. In such circumstances, since the plaintiff in

such an action is not a party to the contract concerning which the bond was posted, the matter of alteration of the contract between the principal and obligee is immaterial. But with such interests eliminated, it is only just that he who seeks to take advantage of the protection afforded by the bond must conduct himself in such a way as not by his own act to contribute to the risk of a surety.

Where a performance bond is involved containing express conditions precedent to recovery, those conditions are given full weight and force and if they have not been complied with the surety is exonerated from any liability to the obligee. We mention two California cases of importance in this connection, the decisions of which enunciate the principles above expressed. First is *Roberts v. Security T. & S. Bank* (1925), 196 Cal. 557, 564, 238 Pac. 673, in which case the court declared:

> "No principle of law is perhaps better settled than that the liability of a surety is not to be extended by implication beyond the express terms of his contract. (Civ. Code, sec. 2836) It is also the law that when the undertaking is to assure the performance of an existing contract, if any change is made in its requirements in matters of substance without the consent of the surety, his liability is extinguished."

The second case is *First Congregational Church v. Lowrey* (1917), 175 Cal. 124, 126, 165 Pac. 440, wherein the court expressly refers to Section 2819 of the Civil Code above quoted, saying:

> "Section 2819 of the Civil Code provides that a guarantor 'is exonerated, . . . if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in

> any respect.' (See, also, Civ. Code, sec. 2840, applying the same rule to sureties.) Our decisions construing these sections uniformly hold that if there has been such a change in the contract in any (material) respect, the inquiry there ends, and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury."

An alteration of contract such as will exonerate a surety may be by oral or written agreement. There was no written alteration of contract involved in the instant case. It is contended, however, by appellant that the subcontract was altered by oral agreement in several respects.

California Civil Code, Section 1698, reads as follows:

> "(Written contracts, how modified.) A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

As we will hereafter show, the subcontract has been altered by executed oral agreement. We will also point out that in the circumstances of this case Radkovich is estopped to deny the alteration of contract. We further contend that a change in the performance of the subcontract obtained by economic stress is a lack of good faith which in the light of the principles above set forth exonerates Glens Falls from any liability to Radkovich and consequently to Radkovich Sureties.

When we speak of alteration of contract, we mean, of course, alteration of contract without the consent of the surety. There is nowhere in the record any evidence that Glens Falls was notified of or consented to the alteration of the subcontract between Radkovich and Woolley.

The specific application of the foregoing principle will be taken up under separate heading relating the facts to the law.

b. The Subcontract Was Altered When Radkovich Required Woolley to Perform Work and Furnish Materials Which Were Not Within the Scope of the Subcontract or Any Authorized Modification Thereof.

At the inception of the subcontract Woolley reported to the superintendent on the job as he was instructed to do by Radkovich and reported to Barrington's office to arrange for location changes to correspond with certain practical details of construction and his suggested revisions were referred to the Radkovich office for processing through the office of the United States Engineers.

On or about the same day that Woolley's crew first appeared on the job and commenced work, Woolley was handed a new drawing which was the Revised Electrical Plan mentioned in the facts. This drawing showed substantial additions to the work shown on the Original Electrical Drawing upon which the subcontract was based. There were four items which from all the evidence were clearly in dispute and for which the court ultimately permitted Woolley to recover—the bell circuits, telephone circuits, closet lights and fixtures.

As soon as Woolley obtained this plan he went immediately to see Radkovich, checked with the engineers and upon learning that the engineers would insist that these items be included in the contract and that the engineers refused to discuss payment for such items, he returned to see Radkovich and had a discussion, the details of which are particularly set forth in the facts above. In substance, Radkovich told Woolley to go ahead with the

wiring according to the Revised Electrical Plan, he acknowledged that the additional items were not on the Original Electrical Drawing and that Woolley would be entitled to additional compensation for this extra work. At this time the discussion was limited to the first three items and did not concern fixtures.

After the engineers approved the Revised Electrical Plan, Woolley commenced work as required by Radkovich and wired the Revised Electrical Plan, installing in each house the additional tubing, outlet boxes, wires and other electrical equipment required by the Revised Electrical Plan [R. 457].

From early October, 1947, to May, 1948, Woolley continued to perform as above set forth. In May. 1948, and not before, Radkovich repudiated his former promise to give Woolley extra compensation for these additional items. *It is our contention that as each unit was wired to this plan, the agreement with Radkovich was fully executed as to such house and that this constituted an executed oral agreement altering the subcontract.* Moreover, appellant contends that by permitting Woolley to act upon his oral promise, Radkovich caused Woolley to substantially change his position to his detriment and that Radkovich is thereby estopped to deny his oral agreement and that the effect thereof is to alter the subcontract with respect to the three items above referred to. It is presumed in law that any alteration of a contract is prejudicial to the rights of the surety, whether or not the alteration is detrimental, but here, such alteration resulted in obvious detriment to the surety.

The argument that the agreement above referred to between Radkovich and Woolley was in effect another contract, separate and apart from the subcontract, is

untenable because the items in question were not separable from the other portion of the subcontract. They all required that electrical conduit be installed upon the forms set up by Radkovich preparatory to pouring the house. It required a rerouting and redesigning of the tubing and outlet boxes originally provided for in the subcontract which, in itself, is an alteration of the subcontract.

While the additional cost of labor and the additional cost of materials might be computed on an over-all basis as a result of the additional items, it would be manifestly impossible to segregate this cost from the standpoint of a separate and independent contract. Moreover, all of the materials which were used by Woolley in the performance of the subcontract, including these additional items, were taken into consideration in making progress payments upon the contract. They were not separated and there is no evidence of any intent to separate the original subcontract from the subcontract as altered by this agreement. It should be observed that the court never tackled the problem here presented in either its Memorandum of Conclusions or Findings of Fact and Conclusions of Law.

That this was one of the major issues of the trial is obvious throughout the transcript of the testimony commencing with the examination of the first witness by Mr. McCall, counsel for Glens Falls, and by Mr. Benedict, counsel for Woolley.

The law on the question of the alteration of a written contract by oral agreement is clear cut. No authority beyond Civil Code, Section 1698, need be cited for the proposition that a contract in writing is altered by an executed oral agreement. Beyond this point in circumstances such as have above been shown to exist in this case,

where a party on the basis of an oral agreement changes his position to his detriment, the other party is estopped to deny the agreement and this, cases hold, is not contrary to Section 1698.

The very late case of *D. L. Godbey & Sons Construction Co. v. Deane* (1952), 39 Cal. 2d 429, 246 Pac. 2d 946, is a case somewhat similar to the one at bar. The Supreme Court of California recognized that cases have held that an oral agreement must be fully performed on both sides to be executed under the meaning of Section 1698 but came to the conclusion that where there was adequate consideration for the oral agreement altering the contract and in which the party relying thereon had fully performed, the contract has been enforced as modified whether or not the other party had performed on his part.

The case above cited concerns a contract which was fully performed by the contractor and points to the fact that failure to pay for the performance by the other party does not prevent the full enforcement of the oral contract.

The problem of estoppel was directly presented in the case of *Penno v. Russo* (1947), 82 Cal. App. 2d 408, 412, 186 P. 2d 452, in which case the court held that where one party to a contract by conduct or representations waived the performance of a condition thereof, he is estopped by such conduct or representations to deny that he has waived such performance.

The case of *Wilson v. Bailey* (1937), 8 Cal. 2d 416, 421, 423, 65 P. 2d 770, is a parallel case with the instant case, the court holding that the party who has permitted the other party to change his position in reliance upon an

oral promise will be estopped to deny the oral modification. We quote from the opinion of the court:

> "And likewise, while it is settled in view of section 1698 of the Civil Code which provides that a written contract may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, that a written contract may not be varied or modified by an executory parol agreement, nevertheless, it is also true that the facts of a particular case may give rise to an equitable estoppel against the party who denies the verbal modification."

And the court further in the opinion says:

> "It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove,* 100 U. S. 578, 580 (25 L. Ed. 618) and quoted therefrom in *Carpy v. Dowdell,* 115 Cal. 677, 687 [47 Pac. 695], as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.' "

Upon the authority above cited, we respectfully contend that the subcontract between Radkovich and Woolley was materially altered without the consent of the surety, that such alteration was of a nature to be binding upon both parties thereto, was in part fully executed and enforceable as to the other part, so as to bind the parties to perform the subcontract as altered.

In the foregoing discussion we paused to discuss the law at the point in the facts where Radkovich repudiated

his oral agreement. To continue from that point, it is to be observed from the exhibits which reflect the correspondence between the parties concerning the dispute over the additions to the subcontract and by their conduct thereafter that Radkovich insisted and adhered to his position that Woolley was required to perform the contract according to the Revised Electrical Plan. Radkovich only maintained that Woolley was not entitled to additional compensation therefor.

On the other hand, Woolley was firm in his contention that he was entitled to additional compensation therefor, relying upon the oral promise theretofore made. After Woolley walked off the job and returned, Radkovich not only accepted Woolley's further performance, knowing his contentions, but demanded it, apparently content to leave the matter of additional compensation to be later litigated. We believe that the conduct of the parties was such as to constitute an alteration of the subcontract as to the fixtures.

Radkovich demanded that Woolley return to the job and that he install fixtures, and Woolley was ready and willing to do so contingent only upon additional compensation therefor. By mutual consent the parties agreed to complete the work, each reserving only the issue of compensation. Upon completion of the subcontract by Woolley on October 6, 1948, we believe that Woolley fully performed the subcontract on his part and that it was altered by executed agreement in the total amount of $8,277.67.

The materiality of change in the Revised Electrical Plan hardly needs to be mentioned because it is quite obviously substantial, the court having found that Woolley was entitled to additional compensation in the sum of

$8,277.67, which is in excess of 10% of the contract price.

We call the Court's attention to one further point above made, which is that the evidence showed Woolley to be in great financial stress [R. 419 is an example]. He owed Westinghouse a large sum which he had been unable to pay. The payments which he had received from time to time from Radkovich were uncertain and not determinable in advance and it was extremely important that Woolley take such further action as might be necessary to complete the performance of his contract so as to be in a position to compel Radkovich to compensate him in the full amount of his subcontract price plus such additional amount as the alteration might justify.

With full knowledge of these circumstances, Radkovich insisted upon Woolley's return to performance by June 14, 1948, the penalty for not complying with this demand being that Radkovich would complete Woolley's subcontract and charge the cost thereof to Woolley. We represent that this is a form of compulsion by economic stress, which is a lack of good faith between the parties and that the insistence by Radkovich that Woolley perform according to the Revised Electrical Plan which Radkovich had acknowledged contained items not originally contemplated, was such lack of good faith as to be inconsistent with the relationship existing between Radkovich, Woolley and Glens Falls and that Radkovich thereby deliberately jeopardized the surety and increased its risk as a consequence of which Glens Falls should be exonerated from liability to Radkovich.

We again call the Court's attention to the case of *First Congregational Church v. Lowrey* (1917), 175 Cal. 124, 125, 126, 165 Pac. 440, where there were unauthorized

changes in the contract amounting to a total of over $500.00 extra work. The lower court found:

> "That none of such alterations, deviations, or omissions were detrimental to the interests of the defendant, Pacific Surety Company, . . ."

The appellate court held that notwithstanding such finding, Civil Code, Sections 2819 and 2840 "speak with absolute finality upon the subject" and exonerated the surety.

c. The Subcontract Was Altered When Radkovich Paid Woolley Before the Money Was Earned and Payable Pursuant to the Terms of the Subcontract.

As pointed out in the facts the first progress payment made to Woolley was for $5,000.00. At the same time $4,000.00 additional was paid to Woolley by the prime contractor. Woolley paid $500.00 referred to as interest to the prime contractor to obtain the so-called loan of $4,000.00. In November or December of 1947 the $4,000.00 was taken out of amounts then admittedly due Woolley [R. 262, 291-292]. Was this in reality a loan or an advance? We believe that it was an advance and the $500.00 was a discount.

It does not appear that a note was signed by Woolley and Woolley had no control over the matter of repayment. It was taken out of an estimate without consulting Woolley [R. 291-292]. It had originally been agreed that it would be taken out of some future progress payment. Moreover, interest in the sum named for such a short period would unquestionably be void. (*Haines v. Commercial Mortgage Co.* (1927), 200 Cal. 609, 254 Pac. 956, 255 Pac. 805, 53 A. L. R. 725.) The courts

will not construe a contract in a manner to cause any part of it to be illegal or void unless such construction is unavoidable. The actual transaction does not have the characteristics of a loan because repayment was not within the control of the debtor, no time for repayment was specified, no demand was made before withholding and the $500.00 payment was more in the nature of a discount or agreement to reduce the total subcontract price than an interest payment for the use of money because the use was of unspecified duration.

We think that *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.* (1931), 214 Cal. 384, 5 Pac. 2d 888, is a case very directly in point and controlling. This case held that what was characterized as a loan in parallel circumstances was actually an advance.

Returning to the facts, we find that by executed oral agreement, the subcontract price was reduced by $500.00 without the consent of the surety. It also appears that Woolley was paid $5,000.00 plus $3,500.00 (the $4,000.00 less $500.00) or $8,500.00 on the first estimate. This estimate was based upon materials only.

The second payment was $15,000.00, making total payments in the sum of $23,500.00 to date of the second estimate. It appears from Woolley's statements on the occasion of the first and second estimates that the first estimate was duplicated in the second, plus labor and material costs since incurred. So Woolley's second estimate was his total cost to that date, the sum of $16,551.09, or a difference of $6,948.91.

Woolley's second estimate listed materials totaling $13,-111.71 [Ex. 13; Nov. 1, 1947, estimate] and $3,439.38 for labor. Woolley's testimony showed that the $3,-

439.38 for labor could be supported only to the extent of $2,774.17 [R. 454], resulting in an overcharge of $665.21. Also, $949.22 worth of this total labor charge of $3,-439.38 was non-productive labor [R. 454-455], leaving productive labor of $1,824.95.

Subtraction of the $665.21 overcharge reduces Woolley's second estimate from $16,551.09 to $15,885.88. With the further subtraction of the $949.22 of non-productive labor, Woolley's second estimate is finally reduced to $14,936.66. This figure of $14,936.66 represents the productive labor and supplies delivered to the job.

Therefore, the overpayment to Woolley was $8,563.34; *i. e.,* the difference between $23,500.00, the amount actually paid to Woolley to the date to this estimate, and $14,936.66, the actual amount of productive labor and materials supplied by Woolley to this date. Note that if 10% of the $14,936.66 is also deducted as a hold-back, pursuant to the provisions of the subcontract, this $8,563.34 overpayment, or differential, is increased to an overpayment of $10,057.00.

As we observed in stating the facts, there is necessarily a close relationship between the actual labor and materials on the job and the progress made. This suggests another comparison. Giving Woolley full credit for the materials in the sum of $13,111.71, as listed in this second estimate of Woolley's, we have a total productive labor in the sum of $1,824.95 producing progress in the sum of $10,388.29 ($23,500.00 paid less $13,111.71 of materials). This is so out of balance with reason that we believe that notwithstanding the fact that his progress on the job cannot be determined with mathematical precision, a payment in excess of earnings to the date of the second

estimate is established. Even if this figure is reduced by $3,500.00, the amount we have added as representing the advance, the earnings of $1,824.95 worth of labor would be $6,888.29, which is still unreasonably out of proportion.

It is to be expected that a payment in advance of earnings would result from the duplication of $9,885.37 worth of materials.

The question simply is, does this exonerate the surety? The case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.* (1931), 214 Cal. 384, 5 Pac. 2d 888, answers this question affirmatively. We quote from page 396:

> "In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the $1,000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found. Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated."

County of Glenn v. Jones (1905), 146 Cal. 518, 80 Pac. 695 is to the same effect.

d. The Subcontract Was Altered When the Method of Payment Was Changed From a Progress Payment Method of Payment to a Unit Method of Payment.

At the request of Mr. Radkovich, Woolley agreed to change the method of payment from the progress payment method to the unit method of $390.00 per house. The third estimate was submitted upon this basis, but Mr. Radkovich told Woolley that the prime contractor was in

financial difficulty and asked Woolley to accept $200.00 per house. Woolley accepted and was paid $3,000.00 on account of this estimate. Every other estimate presented by Woolley was on this basis.

We believe that this constituted an alteration of the subcontract which releases the surety. We refer the court to *Mundy v. Stevens* (3 C. C. A., 1894), 61 Fed. 77.

e. There Is No Finding Upon the Substantial Question of Alteration of Subcontract and Performance. This Is Reversible Error.

We have above pointed out four separate and distinct alterations of the subcontract and performance which alterations were without the consent of Glens Falls, the surety. We have also cited the law on the question showing that such alterations exonerate a surety from liability on its bond. That such alterations were material was shown. From the statement of facts and from the discussion of the various matters in the court's Memorandum of Conclusions, it appears that all of these contentions were treated as issues at the trial.

Appellant is entitled to a finding of fact upon the material issues of fact thus raised, but there is none. The only findings which might be considered to affect the various contentions are in irreconcilable conflict or are inadequate to settle the issues. In Point 3 of Argument, we have cited authority for the proposition that it is error to omit findings on such substantial and material issues.

The four alterations of subcontract and performance established are:

(1) Additional material and labor were added; (2) The contract price was reduced by $500.00; (3) Woolley

was paid a substantial sum of money before it was earned; and (4) The method of payment was changed.

The alterations of subcontract and performance above shown are sufficient to indicate that Findings XI, XII, XV, XVII and XVIII are unsupported by the evidence, are conflicting among themselves and with other findings. Reference is made to the Specification of Error for further statement of the conflict existing in the findings.

5. The Judgment Against Glens Falls Cannot Be Predicated Upon the Performance Bond Because Woolley Fully Performed.

The performance bond was given to assure performance and the obligation was to be void if Woolley fully performed. The court found that Woolley did fully perform in Findings XIII and XVI and these findings are in this respect well supported by the evidence and are not contested. Hence Conclusion of Law II is unsupported so far as it relates to the performance bond.

6. Recovery Cannot Be Predicated Upon the Performance Bond Because Radkovich Did Not Comply With the Express Conditions Precedent to Liability of the Surety Specified in Said Bond.

The performance bond [Ex. C] contained the following express conditions precedent to the surety's (Glens Falls Indemnity Company) liability thereon:

> "The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified:
>
> "The said Surety shall be notified in writing of any act on the part of said Principal, or its agents

> or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, or any representative duly authorized to oversee the performance of said subcontract, and a registered letter mailed to the said Surety, at its principal office in the city of Glens Falls, state of New York, or its Pacific Coast Department in the city of San Francisco, state of California; shall be the notice required within the meaning of this bond:"

No finding was made upon this issue in either phase: (1) Whether Radkovich performed the subcontract as he was required to do and (2) whether Radkovich gave notice immediately after receiving knowledge of circumstances which might involve a loss to the surety.

As to the former there was considerable evidence as to the failure of Radkovich to perform. Note that damages were allowed Woolley by the court for delay caused by Radkovich [Finding XVI]. We have already shown in Argument, Point 4-b that Radkovich enforced a change in the performance by economic compulsion, and in Argument, Point 4-c, by compelling the reduction of the total contract price and paying money to Woolley before it was earned, and in Argument, Point 4-d, by changing the method of payment.

As to the latter, we have pointed out in the facts that the notice required was not given in one instance and 60 days delayed in another. Notice was never given by Radkovich to Glens Falls that Woolley was in financial difficulty [R. 347-348], a fact that came to the attention of Radkovich in September of 1947 when the

first progress payment was due. The advance or loan of $4,000.00 was made to Woolley at this time, upon Woolley's representation that he could not proceed unless he got $4,000.00 more at that time. This circumstance directly led to the judgment actually rendered in this case against Glens Falls, for it was Woolley's financial condition that accounts for his failure to pay Westinghouse.

The second instance was when Westinghouse gave notice on April 10, 1948, to Radkovich of Woolley's obligation to Westinghouse. Radkovich failed to notify Glens Falls until June 10, 1948, 60 days later. Surely this is not "immediately."

First, let it be observed that Section 2787 of the California Civil Code abolishes the distinction between a surety and a guarantor. We then turn to the case of *Schwab v. Bridge* (1915), 27 Cal. App. 204, 206, 149 Pac. 603. In construing a guaranty the court said:

> "Where a contract of suretyship stipulates that notice shall be given to the surety of the principal's default, failure to comply with the condition or to give notice within the time specified will prevent recovery from the surety."

Union Indemnity Company v. Lang (C. C. A. 9, 1934), 71 F. 2d 901, is the leading federal case on notice. It was decided in this state before the decision of the United States Supreme Court was rendered in *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817. However, although the *Lang* case was decided before it became mandatory for the federal courts to follow the state law, that case was decided on the basis of the California state law. The *Lang* case has not been

disapproved by any subsequent decision of the California courts. The court stated the law, on page 906, as follows:

> "We believe that the decisions of the highest courts of California have recognized the principle of strictissimi juris in connection with notice of default, breach, or any act or omission that might cause a loss for which the surety might become liable, regardless of whether or not the surety has been in fact prejudiced by failure to receive such notice."

See also:

Bensley v. Atwill (1859), 12 Cal. 231.

7. Cross-claimants Have Failed to Allege and Prove the First Condition Precedent to Recovery Upon the Performance Bond.

The first condition precedent of the performance bond is that Radkovich shall do and perform each and every of the matters and things set forth in the subcontract. This includes payment according to the terms of the subcontract. We have argued and, we believe, have demonstrated that Finding of Fact XVIII is not supported by the evidence in that the evidence shows that Woolley was paid more than was due him at the time of the second progress payment. Notwithstanding this contention, the burden of proof is upon cross-claimants to affirmatively demonstrate that Radkovich paid Woolley according to the terms of the subcontract. Finding of Fact XVIII is to the effect that the evidence is insufficient to establish that Radkovich did pay Woolley in the manner specified by the subcontract. Accordingly, cross-claimants are not entitled to recover because they failed in their proof.

8. No Support Can Be Found for Finding XVIII Because the Evidence Establishes the Special Defenses of the Surety.

We believe that we have established that the subcontract was altered in four ways and that the cross-claim does not state a claim upon which relief can be granted and that in these particulars Finding of Fact XVIII is not supported by the evidence.

9. The Payment Bond and the Performance Bond Should Be Construed Together.

The performance bond and the payment bond were both given for one premium as appears on the face of the bonds themselves. They are for the exclusive protection of Radkovich and neither one is available to third parties. The obligee, Radkovich, owes the duty of good faith and fidelity to the surety and must do everything for the protection of the surety. If Radkovich has seen fit to neglect its duty of good faith and fidelity to the surety, Radkovich is not entitled to hold the surety liable for a risk to which Radkovich contributed. The surety relied upon Radkovich to carry out its obligations under the bonds and intended to take no risk greater than its bond specifically covered. Since the violation of provisions of the performance bond was such as to prejudice the risk taken by the surety, the surety should be exonerated.

10. **The Court Erroneously Granted Judgment Against Glens Falls for the Full Amount of the Westinghouse Judgment Which Included Not Only Obligations Assessable Against the Subcontract, but Extras as Well.**

While we have contended that the items referred to in Finding XV were all included in the subcontract by alteration thereof by Woolley and Radkovich without the consent of Glens Falls, in the event that it should be considered that the items in Finding XV are not included in the subcontract, the court has granted a judgment which exceeds the liability of Glens Falls.

As we have demonstrated and as Woolley testified, the supplies obtained from Westinghouse by Woolley went into the subcontract and into the installation of phone circuits, chime circuits and closet lights. If these items are not a portion of the subcontract, then Glens Falls has been held liable for the cost of materials which were not used in the performance of the subcontract for which the bond was furnished. For this reason, there is no alternative to reversal.

Conclusion.

There was no justiciable controversy presented by the cross-claim. The court lacks jurisdiction to determine any such controversy if one exists. The court has failed to make findings upon which a conclusion of liability of appellant can be based. The surety cannot be charged with financial liability on a contract or claim foreign to the one for which the bond was given. The findings are con-

flicting, but if the conflict is resolved according to the only rationale which will eliminate conflict, exoneration of the surety will result. The evidence shows that had adequate findings been made in accordance with the evidence, appellant would of necessity be exonerated of liability to cross-claimants.

The Radkovich cross-claim should be dismissed for want of jurisdiction, but if this Court should conclude that the trial court had jurisdiction, appellant should be exonerated from liability to cross-claimants for all or any one of the reasons hereinabove specified.

Respectfully submitted,

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APPENDIX.

Chart of Pleadings.